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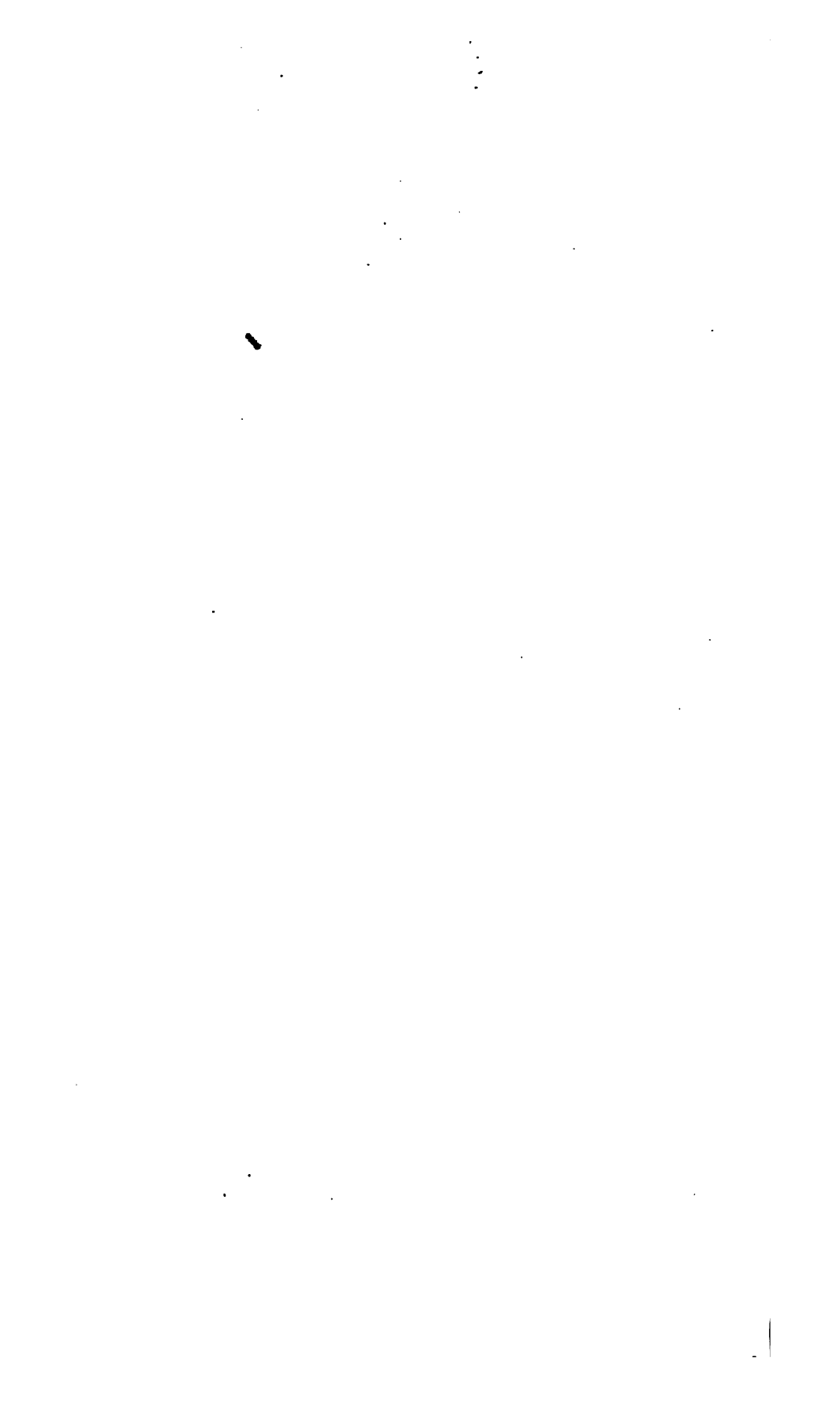
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Four





REPORTS
OF
DECISIONS RENDERED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

BY
BENJAMIN VAUGHAN ABBOTT.

VOL. I.

NEW YORK:
DIOSY & COMPANY.
1870.

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PREFACE.

To present the adjudications of the United States Circuit and District Courts, in a comprehensive and satisfactory manner, is the general purpose of this series.

The progress of our national jurisprudence is embodied in the laws passed by Congress, the decisions of the Supreme Court, and those decisions of Circuit or District Courts which are not reviewed on writ of error or appeal; in addition to which should be mentioned the determinations of the Court of Claims, as covering one important though limited department. Systematic and satisfactory arrangements now exist (relying partly upon government aid) for the prompt publication of the acts of Congress, and for regular reports of the adjudications of the Supreme Court and of the Court of Claims. If the system of reporting the important decisions of the Circuit and District Courts can be made comprehensive and reliable, there will then be in operation a complete scheme, presenting the progress of the entire jurisprudence developed under the operation of the national government.

To some extent the decisions of the Circuit and District Courts are now reported. There is, for the first circuit, a special series of Circuit Court Reports, almost unbroken; and for the second, another, nearly, though not quite, as continuous. In some other circuits there are valuable reports covering limited periods. But there remain some circuits which are almost wholly unreported.

And as respects the *District* Courts, there has not been any thing like a systematic method of selecting and reporting what is valuable in their decisions.

So far as it is practicable for reports within a particular circuit to be maintained, the cases which they may include ought not to be duplicated in these volumes. But the endeavor of this series will be, to collect from the Circuit and District Courts at large, wherever local reports are not supported, those decisions which have general value and importance, and to report them in the best and most satisfactory manner; to the end that the current volumes of the Supreme Court Reports and of this series, may give, from time to time, a good view of the course of decision in the national courts.

The *selection of cases* to be reported in these volumes, must be chiefly controlled by the consideration of their value and utility to the practicing lawyer. There is a tendency towards the unnecessary multiplication of reports, to which, it is hoped, this enterprise will not be found to yield. The volumes will be devoted to decisions of general application and value, exhibiting the advance and progress of the national jurisprudence; the construction and application of the United States laws; the procedure of the United States tribunals, and similar subjects. And as far as practicable, cases of only local application; decisions which only resolve controverted questions of fact peculiar to the particular controversy, or repeat and apply familiar principles of law; together with decisions which, there is reason to anticipate, will be carried before the Supreme Court for review, or will be seasonably reported in standard reports to which the bar would naturally turn for them; will be excluded.

BENJAMIN VAUGHAN ABBOTT.

NEW YORK, *June*, 1870.

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DECISIONS
OF THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

1865—1870.

THE MARY WASHINGTON.

*Circuit Court, Fourth Circuit ; District of Maryland,
April T., 1865.*

CARRIERS.—ADMIRALTY JURISDICTION.

The duty of a common carrier by water is not fulfilled by simple transportation from port to port. The goods must be delivered ; or at least landed, and a reasonable opportunity given to the consignee to inspect them.

The general rule requires the carrier to notify the consignee of the arrival of the goods. If a carrier relies on circumstances as excusing this duty, he must prove them.

To show that the carrier was accustomed to store goods in his warehouse, on their arrival, and let them remain there until the consignee should learn from the consignor that they had come, without showing that the consignor knew of and assented to this practice, is not enough to excuse the carrier from the duty of giving notice himself to the consignee. He will continue liable as carrier, until the consignee has received, from some quarter, information of the arrival of the goods and an opportunity to remove them.

The fact that after receiving such notice the consignee refuses to take the goods, cannot relieve the carrier from liability for injury sustained by them *before* that time.

The courts of the United States have not jurisdiction of actions against warehousemen, as such, prosecuted between citizens of the same State.

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The fact that a contract of affreightment is to be performed wholly between ports within the same State, does not exclude it from the admiralty jurisdiction of the courts of the United States. The admiralty jurisdiction conferred by the constitution upon these courts, extends to all contracts of a maritime character to be performed upon *navigable waters*.

A carrier transported goods to the port of delivery, and then, without notifying the consignee that they had come, stored them in his warehouse; where they were injured before the consignee knew of their arrival.

Held, 1. That the carrier was liable as such, and not as warehouseman only; in the absence of affirmative proof of some facts excusing him from the duty of giving notice.

2. That, as the contract was for transportation over navigable waters, the consignor might proceed for damages, in the district court, in admiralty; notwithstanding the port of shipment and the port of delivery were both in the same State.

Appeal from a decree of the District Court in Admiralty.

The libel in this cause was filed by Ayres and others against the owners of the *Mary Washington*, to recover damages for their failure to deliver in good order merchandise entrusted to them for transportation.

It appeared by the evidence on the hearing in the district court, that the respondents below undertook, in consideration of a specified freight to be paid by the libelants, to transport the merchandise in question from Baltimore to a place called Hill's Landing, on the Patuxent River, to be delivered to one Pumphrey. The respondents were in business as common carriers between these points. The goods reached Hill's Landing in safety; and, there, were landed from the steamboat, the *Mary Washington*. The consignee, Pumphrey, was not present to receive them; and they were placed in a warehouse occupied by the respondents, and connected with their wharf. While remaining there stored, the goods received the injuries for which this suit was brought.

The Mary Washington.

The respondents were accustomed, in the regular course of their business, to deposit goods arriving at Hill's Landing, which could not for any reason be immediately delivered, in the warehouse above mentioned, for safe keeping until delivery should be made. No additional charge was made for such storage; it was regarded as an incident to the carriage, and as paid for in the freight.

It did not appear that any notice of the arrival of the goods was given to Pumphrey.

Upon the above facts, the district court gave judgment for the libelants; from which the owners of the steamboat now appealed.

P. W. Crain and William M. Addison, for the appellants.

William Pinkney Whyte, for the respondents.

CHASE, Ch. J. — Under the circumstances of this case, I think that the contract of affreightment bound the carriers not only to carry the merchandise to the landing, but to deliver it to Pumphrey, or excuse non-delivery by proof of equivalent action or waiver. The duty of a carrier by water is not fulfilled by simple transportation from port to port. The goods must be delivered, or at least landed, and a reasonable opportunity given to the consignee of ascertaining their condition. In order that opportunity for inspection and for the removal of the goods may be given, the consignee must be notified of the arrival of the goods. This is the general rule. If exceptions are made by usage, circumstances, or special arrangements, they must be shown by proof.

In the present case, the respondents allege that it was not their practice to give notice to consignees, but instead of giving such notice, to deposit goods in their

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warehouse, where the consignees were expected to call for them, on learning from their correspondents, or otherwise, of their arrival. They insist that this arrangement was for the benefit of the owners of the goods, and was understood and agreed to by them. The evidence does not sustain this claim. It shows, clearly enough, the practice of the respondents ; but it does not show any understanding, on the part of the owners of the goods, that the respondents were to be relieved from their responsibility as carriers until actual delivery of them, or an equivalent deposit in their warehouse, with information conveyed to the owners in some way that their goods had arrived. The warehouse arrangement was rather for the convenience of the carriers than of freighters or consignees. The storage, with information of arrival, however obtained, may be regarded properly enough as a substitute for actual and direct notice ; and it may be admitted that opportunity for removal, after such information, would discharge the carriers from responsibility as such, in the same manner as actual notice and the like opportunity. But to hold that mere deposit in their own warehouse, under the circumstances of this case, terminated their special responsibility, would be a dangerous relaxation of the salutary rule on which the security of commerce so largely depends.

It is clear, from the proof, that the merchandise was damaged after the landing, and while in the custody of respondents, before Pumphrey had information of its arrival, or opportunity to take it away. It seems, however, that the merchandise was not ordered from the libelants by Pumphrey, and that he declined to receive it ; and it is alleged that the carriers, therefore, were not liable. And there was proof that no order for the merchandise was actually given, and that Pumphrey, on learning its condition, refused to have any thing to do with it. But it is not easy to perceive the

The Mary Washington.

importance of this circumstance. It is plain enough that the libelants acted in good faith upon an expectation founded on a conversation with Pumphrey, that he would like to have the merchandise sent to him, and that he would receive and pay for it, if of good quality and in good condition, and the proofs show that this expectation was warranted. Whether warranted or not, the duty of the carriers was in no way affected. Their obligation, both to shippers and consignees, was to convey and deliver (or at least offer to deliver) safely. It is true that after Pumphrey had information of arrival, and declined to receive the merchandise because of its bad condition, the respondents could not be held responsible as carriers, to the libelants, for subsequent injuries in the warehouse; but their responsibility for prior injuries was not changed, and it is that responsibility only which is now in controversy.

In the present case, the question whether the respondents were liable as common carriers or as warehousemen is of little importance, except as a question of jurisdiction. The proof shows a degree of negligence which would make them liable in either character. But if their liability were as warehousemen only, they would not be responsible in this court. A court of the Union has in general no jurisdiction of suits against warehousemen by citizens of the same State. Remedies for violation of these contracts must be sought by their co-citizens in State courts.

It is not questioned, however, that the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction. This is a provision of the national Constitution. Nor is it questioned that this whole jurisdiction is vested by law in the district courts of the United States, and, on appeal, in the circuit courts. This was expressly enacted by Congress, in 1789. Nor is it questioned that a con-

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tract of affreightment, to be performed by traversing tide waters, or other navigable waters, is in general a maritime contract, or that a suit upon such a contract makes a case of admiralty jurisdiction. This is settled by repeated decisions. But it is insisted that the contract of affreightment in this case was to be performed wholly within the State of Maryland, and that this case, therefore, having arisen from an alleged breach of it, is not within the admiralty jurisdiction. Upon this I remark, in the first place, that there is nothing in the nature or history of admiralty jurisdiction which excludes from its cognizance contracts to be performed within the country or State in which it is exercised. On the contrary, such contracts, if maritime in their character, were constantly held, before the organization of the Union, to be proper subjects of that jurisdiction.

Within a comparatively recent period, however, doubts have been expressed whether such contracts can be enforced by national courts sitting in admiralty. Such doubts were expressed, in 1848, by Justice NELSON, speaking for a majority of the justices of the supreme court of the United States in the case of *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 *How.* 392. They were founded on the assumption that "the exclusive jurisdiction in admiralty cases was conferred on the national government as closely connected with the grant of commercial power," and were cautiously stated as follows: "It is a maritime court, instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limits of the commercial power, which would confine it, in cases of contracts, to those concerning the navigation and trade of the country upon the high seas and tide waters with foreign countries, and among the several States. Contracts growing out of the purely internal commerce of the State, as well as

The *Mary Washington*.

commerce beyond tide waters, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the Federal courts."

The principle thus intimated rather than asserted was applied, ten years later, in the case of *Allen v. Newberry*, 21 *How.* 244, to a contract of affreightment to be performed on Lake Michigan, between two ports in Wisconsin; but the decision against the jurisdiction over the contract was placed quite as much upon the act of Congress of February 26, 1845,—which restricts admiralty jurisdiction on the lakes and interior navigable waters to contracts relating to vessels employed between ports in the different States,—as upon the more general restriction derived from the limitation of the commercial power.

It cannot escape observation that this denial of jurisdiction to the national courts of affreightment contracts to be performed between ports of the same State, but on navigable waters, where, in cases of tort, the admiralty jurisdiction is undoubted, rests wholly upon the assumption that the restriction upon the commercial power operates as a constitutional limitation of the jurisdiction in admiralty over contracts.

Now, without more than a reference to the difficulty of assigning a reason for such a limitation of that jurisdiction in matters of contract which would not require the like limitation in matters of tort, and to the admitted doctrine that in matters of tort no such limitation exists, it is proper to observe that it has been more than once distinctly denied by the supreme court that any inference whatever in respect to the jurisdiction in admiralty can be drawn from the constitutional provision concerning commerce. Thus in the case of *The Genesee Chief* 12 *How.* 452, the late chief justice, speaking for the court, and speaking with special reference to admiralty jurisdiction, said: "Nor can the

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jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants."

So, too, in the case of *The Propeller Commerce* 1 *Black*, 578, in 1861 ; the supreme court, noticing an objection to its jurisdiction on the ground that it did not appear that the propeller was engaged in foreign commerce, or in commerce between the States, and speaking through Justice CLIFFORD, said : "Admiralty jurisdiction was conferred upon the government of the United States by the constitution, and in cases of tort is wholly unaffected by the considerations suggested in the proposition."

This is the latest judgment of the supreme court ; and unless it can be shown that jurisdiction in matters of contract is not as "wholly unaffected by the considerations" referred to, as jurisdiction in matters of tort, it seems to be my duty, being fully satisfied that this court has jurisdiction, under the constitution and the law, over the contract of the respondents, to award to the libelants that justice to which the proofs clearly entitle them, without turning them out of this and requiring them to resort to another court. I do not think this can be shown, and therefore affirm the decree of the district court.

Decree affirmed.

Mayor, &c. of Baltimore v. Pittsburgh & Connellsville R. R. Co.

**MAYOR, &c. OF BALTIMORE v. PITTSBURGH
& CONNELLSVILLE R. R. CO.**

*Circuit Court, Third Circuit; Western District of
Pennsylvania, July T., 1865.*

REVOCATION OF CHARTER.—PRELIMINARY INQUIRY.

Where a charter of a corporation reserves to the legislature an unconditional power to alter or repeal the act, the corporation cannot complain that a subsequent repealing act is passed without adequate reasons. The legislature may repeal the charter arbitrarily.

But where a charter provides that "if the corporation shall at any time misuse or abuse" its franchises, the legislature may revoke the grant, the power of revocation is thereby made conditional upon the fact of some misuse or abuse; and this fact must be proved upon some inquiry giving the corporation an opportunity to be heard in defense, before the charter can be revoked.

It seems, that a proper mode for the legislature to institute the necessary preliminary inquiry into the fact of misuse, would be to pass a resolution directing that the attorney-general institute the proper proceeding in the courts, to ascertain the fact; and that if, in such proceeding, the charge be found true, the charter be revoked.

Demurrer to a bill in equity.

This case presented only the question of the constitutionality of an act of the legislature of Pennsylvania, purporting to revoke the defendants' franchises.

The original charter of the corporation conferred certain valuable railway franchises upon the company, and contained a reservation of the power to repeal, in the following terms: "If the said company shall at any time misuse or abuse any of the privileges herein granted, the legislature may resume all and singular the rights and privileges hereby granted to such corporation." The City of Baltimore advanced money to the

Mayor, &c. of Baltimore v. Pittsburgh & Connellsville R. R. Co.

corporation, which was expended in constructing the road contemplated by the charter. Subsequently the legislature, by an act passed in 1864, revoked and resumed the privileges granted by the original charter, so far as to restrict the company from building a part of the road which, under the original grant, they might have constructed. The city authorities, apprehending that this enactment, if accepted by the corporation, would diminish the security for the repayment of the advances which the city had made, filed their bill to restrain the corporation from accepting the act. And the corporation demurred to the bill.

GRIER, J.—Is this repealing act repugnant to the constitution of the United States, on the ground that it impairs the obligation of the contract between the State and the company?

The objections made on the argument to the form of the pleadings and the right of the complainants to have the remedy sought in the bill, will be found to have been overruled in a similar case by the supreme court. We refer to the case of *Dodge v. Woolsey*, 18 How. 331. In that case, the complainant was a stock holder in the corporation whose interests were likely to be injuriously affected by the State legislation, if it should be carried into effect. In this case, the complainant is a creditor, who, on the faith of legislative acts granting certain franchises and privileges to the Pittsburgh and Connellsville Railroad Company, has advanced large sums of money which have been expended in constructing its road. If the corporation submits to this act of the legislature, divesting them of a most valuable part of their franchises, the security and rights of the complainant will be materially injured.

The bill is in the nature of a *quia timet*, and the complainant has a right to the remedy sought, if the court shall be of the opinion that the act of 1864 impairs

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the obligation of the original contract, or act of incorporation granted to the Pittsburgh and Connellsville Railroad Company. The only question, then, is as to the validity of this act.

That the act repealing the franchises of the corporation, or a material part thereof, and transferring its franchises and property to another corporation without its consent, impairs the obligation of the original contract, is not, and cannot be denied. Nor is it denied that an act granting corporate privileges to a body of men, who have proceeded on the faith of it to subscribe stock and borrow and expend money in constructing a valuable public improvement, is a contract; and that it is not within the power of either party to the contract to repudiate or annul it without the consent of the other.

The State claims no sovereign power to repudiate its contracts or defraud its citizens, and the constitution delegates no such power to the legislature. If, in the act of incorporation, the legislature retains the absolute and unconditional power of the revocation for any or no reasons; if it is so written in the bond, the party accepting a franchise on such conditions cannot complain if it be arbitrarily revoked. Or if this contract is that the legislature may repeal the act whenever, in its opinion, the corporation has misused or abused its privileges, then the contract constitutes the legislature the arbiter and judge of the existence of that fact. But the case before us comes within neither category. The act does not give an unconditional right to the legislature to repudiate its contract, nor is the legislature constituted the tribunal to adjudge the question of fact as to the misuse or abuse.

Moreover, the case before us admits that the condition of facts upon which the legislature is authorized to repeal the act does not exist. It admits that the corporation has neither "misused or abused its privileges."

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A charter may be vacated by the decree of a judicial tribunal in a proper proceeding taken for that purpose, without any such reservation in the act of incorporation. Then both parties are heard, and a verdict of a jury on the facts can be obtained ; which concludes the question. But the legislature possesses no judicial authority under the constitution, and has no established course of proceedings in the exercise of such power. The party who is injured by its action is not heard. The reasons usually alleged in the preamble to such acts are the mere suggestions of some interested party, seeking to speculate at the expense of others. Professional solicitors, who infest the lobby, are ever ready, for a sufficient consideration, to impose on the good nature of honest but often careless legislators, by the suggestion of any necessary falsehood. If any one feels curious as to the methods used by agents of corporations to obtain such legislative acts as may be desirable, he will find them fully exposed in the opinion of the supreme court delivered in the case of *Marshall v. Baltimore & Ohio Railroad Co.*, 16 *How.* 314, 333.

We do not intend even to insinuate that any such secret service by "skillful and unscrupulous" agents, stimulated "to active partisanship by the strong lure of high profits" to use most "efficient means" to get the vote of the "careless" mass of legislators, has been used in this case. But we do say that the recitals in the preamble to this act exhibit a labored attempt to justify a more than doubtful exercise of power by an array of reasons which, even if true in fact, might be demurred to in law as insufficient.

The act does not contemplate the exercise of the right of domain by which the property of individuals or corporations may be taken for some public use, on making ample compensation. Its object is to transfer the franchises and property of one corporation, anxious by

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every means in its power to complete a valuable public improvement, to another, whose interest is *not* to complete the road, and which is not required to do so at any time in this or the next century.

Where, in a case like the present, the legislature is asked to take the property of one corporation and give it up to another, on the ground that one has abused or misused its privileges, the just and proper mode would be to pass a resolution ordering the attorney-general to institute the proper legal proceedings to ascertain the fact of "misuse or abuse." If such issue be found true, then that the charter be revoked or resumed. We do not say that, without such judicial proceeding ascertaining the existence of the condition in which the right of appeal is reserved, the act is absolutely void. *But we do say* that in all such cases the party injured, if he denies the existence of such "misuse or abuse," has a right to be heard, and to have that question tried before he shall surrender his property or his franchise.

We do not think it necessary to notice the numerous and conflicting cases which have been brought to our notice by the learned counsel. In the case of *Erie & Northeastern R. R. v. Casy*, 26 *Pa. St.* 287; S. C., 1 *Grant's Cas.* 274, the court found, after a full hearing of the parties, that the fact of "misuse or abuse" did exist, and therefore the act was not void. It cannot, therefore, be any precedent for a case which admits that such facts do not exist. The principles of law, so far as they affect this case, are very clearly and tersely stated by Chief Justice LEWIS, in his opinion to be found in 1 *Grant's Cas.* 274, with a review of the cases and a proper appreciation of that from Iowa.

The sum of the whole matter is this :

1. The complainant has shown a proper case for the interference of the court in his favor.

2. The act complained of is unconstitutional and void under the admissions of the case.

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3. The complainant is entitled to the decree of the court on the pleadings, as they stand.

4. The defendants may have leave to withdraw their demurrer and answer over; and if they shall so request, an issue will be ordered to try whether the Pittsburgh and Connellsville Railroad Company have misused or abused their charter.

MCCANDLESS, D. J., concurred.

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District Court; District of Wisconsin, Sept. T., 1865.

VIOLATION OF REVENUE LAWS.—FORFEITURE.

The fact that prohibited articles are secretly introduced on board a vessel by persons employed as hands (such as a cook or waiter) at the will of the master merely, does not necessarily expose the vessel to forfeiture under a statute (such as the act of March 2, 1799, § 103, 1 *Stat. at L.* 701), which imposes, as the punishment for importing specified articles, a forfeiture of the ship in which they have been imported; provided the articles in question are brought on board without the knowledge or consent of the master or owners, and in defiance of reasonable regulations prescribed on board the ship for securing conformity to the law.

If the master connives at such acts of the hands on board the vessel, she may be rendered liable to forfeiture; as the owners are liable for the acts of the master in the discharge of his duties as such. But they are not necessarily liable for the acts of all persons employed by the master on board the ship.

A vessel is not liable to forfeiture for every apparent violation of a revenue law, although the law imposes forfeiture as the punishment for a breach of its provisions. Evidence of a violation throws the burden of proof upon the claimant to show innocence. But accidental mistakes may be explained; and the existence of an in-

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tent to defraud the revenue may be the subject of inquiry, and the claimant may show the act complained of to have been innocent.

Information for a breach of the revenue laws.

The libel was filed against the propeller Governor Cushman, for smuggling distilled spirits in violation of section 103 of the act of March 2, 1799, 1 *Stat. at L.* 703.

John B. D. Cogswell, District-Attorney.

Emmons & Van Dyke, for respondent.

MILLER, J.—This propeller was seized by the collector at the port of Milwaukee, on the seventh day of August, 1865. The information alleges and propounds, as causes for the seizure:—1. That distilled spirits in jugs and bottles, and not in casks or vessels of the capacity of ninety gallons wine measure and upwards, said jugs and bottles containing less than ninety gallons wine measure each, were imported and brought in the propeller, not being for the use of the seamen on board, from the port of Sarnia, in Canada, to Big Summer Island and Fox Island, in the United States, contrary to section 103 of the act of Congress, approved March 2, 1799. 2. That brandy contained in jugs and bottles, and not in casks or vessels of the capacity of fifteen gallons and upwards, was imported and brought in said propeller to the port of Milwaukee, in the United States, from the port of Sarnia, in Canada, the same not being for the use of the seamen on board. 3. That no manifest containing the said jugs and bottles of distilled spirits was exhibited at the first port in the United States, as required by law. The vessel was seized in pursuance of information from one Royall Campbell, who had been employed as mate, and was discharged for drunkenness and incapacity for duty.

From the opening of navigation, in the spring of 1865, until seized, the vessel was running between Green

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Bay and Sarnia, Chicago and Milwaukee and Buffalo, touching at Sarnia.

The cook and a waiter, on May 12, 1865, secretly, in the night time, at Sarnia, purchased and had brought on board the vessel, three gallons of whiskey, three gallons of brandy, and three gallons of gin. On the 23rd of the same month, at Sarnia, they secretly, in the night time, purchased and had brought on board, three gallons of whiskey. And on the 1st of June, at Sarnia, they, in the same manner, and at night, purchased and had brought on board three gallons of whiskey. It was a standing rule of the vessel that no distilled spirits should be brought on board at Canadian ports, by employees. And the cook and waiter, being aware of the rule, and also of the positive orders of the captain to that effect, in purchasing ship stores at Sarnia, requested that the jugs containing spirits purchased of a grocer there, should be secreted in barrels under the stores. They deposited the jugs of spirits in a state room occupied by the waiter, and in a pantry adjoining the kitchen, out of view. Distilled spirits were purchased at Chicago and Milwaukee by officers and men, in the several trips of the vessel. Whiskey was delivered to workmen at Summer Island and Fox Island. And at these places men drank on board secretly, and carried, in bottles placed in their pockets, some of the spirits smuggled at Sarnia, with some purchased at American ports. The cook received payment for those spirits so sold. The clerk and the owner of the pier at Fox Island settled for whiskey which some of the men had purchased of the cook, by crediting the amount on a bill of wood supplied to the vessel, under the belief that the liquor had been brought from Chicago or Milwaukee. The captain and clerk drank liquor handed them by the cook, without compensation. They had no knowledge that any distilled spirits had been brought on board at Sarnia or any other Canadian port,

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by any of the hands, except a case of gin ordered by the captain, until the vessel was seized.

By section 103 of an Act of Congress approved March 2, 1799, 1 *Stat. at L.* 701, no distilled spirits (arrack and sweet cordial excepted) shall be imported or brought into the United States, except in casks or vessels of the capacity of ninety gallons wine measure and upwards, on pain of forfeiture of the said distilled spirits imported contrary to the provisions described, together with the ship or vessel in which they shall be so imported: "*provided*, that nothing contained in this act shall be construed to forfeit any spirits for being imported, or brought into the United States, in other casks or vessels as aforesaid, or the ship or vessel in which they shall be brought, if such spirits shall be for the use of the seamen on board such ship or vessel, and shall not exceed the quantity of four gallons for each seaman." And by section 1 of an act approved March 1, 1827, 4 *Stat. at L.* 235, brandy may be imported into the United States in casks of a capacity not less than fifteen gallons.

It is conceded that the owners of a ship or vessel are liable for the acts of the captain, as their agent, in the discharge of his official duties, but that the cook and waiter are mere employees, as hands on board under the control of the captain, and may be discharged at his will, subject to provisions of law and the terms of their employment.

A cargo of a vessel is the lading of a ship or vessel; the merchandise or wares contained and conveyed in a ship or vessel.

A vessel is not liable to forfeiture for every apparent violation or breach of the revenue laws, in regard to the cargo. Accidental mistakes may be accounted for and explained. Where actions, suits, informations are brought for penalties or seizures, and the government makes out a *prima facie* case, section 71 of the act of

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March 2, 1799, 1 *Stat. at L.* 678, throws the burden of explanation upon the claimant. The *Luminary*, 8 *Wheat*. 407. And by section 67 of the same act, the officers of the customs, after entry made of goods, wares, or merchandise, may, on suspicion of fraud, open and examine the packages; and if any of the packages so examined shall be found to differ in their contents from the entry, then the contents of such packages shall be forfeited, *provided*, that the said forfeiture shall not be incurred, if it shall be made to appear to the satisfaction of the officer, or the court in which a prosecution shall be had, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue.

In the case of *United States v. Nine Packages of Linen*, 1 *Paine C. Ct.* 129, it is decided that when goods are libeled, under the said section 67, for disagreeing with the entries, and the claimant sets up mistake as an excuse, the circumstance that probable cause of seizure has been made out, does not impose on the claimant the necessity of making out an unusually clear case of mistake. All he has to do is to produce ordinary proof. It was there holden, as sufficient and legal excuse for an incorrect entry of goods, that they were entered from an invoice made out in great hurry and agitation, while the goods were packed at Caen, in the absence of the owner, in order to secure them by removal from an apprehended pillage by Prussian soldiery which occupied the place.

It seems to be the policy of the law, that intention to defraud the revenue may be a proper subject of inquiry, and to allow the claimant to show an accidental omission or neglect. *United States v. The Margaret Yates*, 22 *Vt.* 663.

The distilled spirits mentioned in the information having been received on board secretly by employees

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or servants of the vessel, without the knowledge of the captain or clerk, and in violation of a standing rule and positive order, the owners of the vessel would not be liable for their loss. They formed no part of the cargo, to be placed in the manifest as such, nor should the vessel be subject to forfeiture, under the circumstances. The spirits, or such portion as the cook and waiter were not allowed by law, might be liable to seizure.

In the case of *Phile v. The Anna*, 1 *Dall.* 197, it appeared in evidence that the captain of the vessel had only exhibited twenty hampers of porter in his official manifest, while a much greater quantity was found on board the ship, besides forty-two hampers landed and deposited in the store of one Smith, and twenty-four hampers actually delivered on shore to the captain himself, agreeably to his order given for that purpose, in the store of claimants. It was known likewise that a considerable number of hampers of porter had during the passage been removed from the hold and stored away in state-rooms, filling them from the floor to the ceiling. And it appeared that the owners and their agents had been on board before the removal of the hampers from that situation, and must have seen them. The gross number of the hampers discovered by the informants was computed at a little over eighteen tons. The vessel was rightly condemned, but the charge of the court is instructive in the following remark: "The case in *Bunbury* is the single one that reaches the point before us. There the question arises whether goods put on board secretly, and unloaded without the knowledge of the captain, would occasion a confiscation; and the judges agreed that if it was a small matter, and no part of the cargo, it would not. The claimants, therefore, to have the benefit of this case, should show, 1st. That the subject of the present prosecution is a small matter; 2nd. That it was no

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part of the cargo; and, 3rd. That it was smuggled without the knowledge of the captain."

All these positions are satisfactorily established in favor of the claimant. The distilled spirits, taken on board, in the darkness of the night, at Sarnia, on the three several occasions by the cook and waiter, were no part of the cargo, were smuggled without the knowledge of the captain or clerk, and were a very small matter—not deserving the seizure of the vessel by the collector, in the strict enforcement of the revenue law according to its requirements.

The law under which the information is brought allows to each seaman a quantity of distilled spirits for his use on board, not exceeding four gallons. The cook, steward, and waiters in lake vessels are considered and classed as seamen or mariners. They are a necessary part of the crew. They frequently assist in the navigation and care of the vessel at times of pressing necessity. They are allowed a lien in the admiralty for their wages, in common with the sailors. *Flanders on Maritime Law*, §§ 438, 439, 440, and notes.

On the 12th of May, the cook and waiter brought on board nine gallons of spirits. On the two subsequent occasions they brought on board three gallons. If, by the law, these men were entitled to bring into the United States four gallons for each, to be used on board, upon every trip of the vessel, then they only exceeded their allowance as to quantity on one occasion to the amount of one gallon.

The policy of the law will not allow seamen to smuggle on board even their own allowance of distilled spirits. The captain is responsible for the acts of the seamen in this particular, in all cases coming to his knowledge. If he consents to such traffic, or connives at it, he may subject his vessel to seizure.

The captain and clerk may have drunk of these liq-

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uors without knowledge or suspicion of their having been brought on board at Sarnia, secretly, or that the cook and waiter were making merchandise of them. Distilled spirits having been brought on board on all the trips of the vessel at American ports, and freely used and disposed of, the captain and clerk might not suspect that Canadian liquors were either drunk or purchased at Big Summer and Fox Islands by persons not belonging to the vessel. The spirits smuggled at Sarnia being of small bulk, and stored away in disregard of the captain's orders and a standing rule of the vessel, the testimony of the captain and clerk that they had no idea that the spirits which they drank on board, or which were drunk by others, had been smuggled at Sarnia, is entitled to favorable consideration. It is not probable that this traffic in foreign distilled spirits on board the vessel would be allowed. Domestic spirits may be drunk and sold on board, without risk of forfeiture of either the spirits or the vessel. And it is no cause of forfeiture, under the act, for a seaman to extend the courtesy of his bottle of foreign spirits to an officer without compensation, in the absence of knowledge on the part of the officer that such spirits had been smuggled.

The captain had a legal right to order on board the case of gin, not exceeding four gallons, which he used on board.

The distilled spirits, mentioned in the information, not having been received on board as part of the cargo, they were not placed in the manifest. The vessel, therefore, is not liable for not exhibiting a manifest containing it, at the first American port touched at after leaving Sarnia.

I am satisfied that the information should be dismissed.

Decree accordingly.

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STATE OF GEORGIA v. ATKINS.

Circuit Court, Fifth Circuit ; Northern District of Georgia, 1866.

JURISDICTION OF CIRCUIT COURTS.—TAXATION OF CORPORATIONS.

The circuit courts are competent to take cognizance of an action prosecuted by a State.

The circuit courts have power, in a proper case, to grant an injunction against threatened proceedings of a collector of internal revenue, to collect a tax which is not authorized by act of Congress.

The word "corporation," as used in a revenue law declaring that every person or corporation owning a railroad, &c., shall be subject to a tax in respect thereof (Act of June 30, 1864, § 103, 13 *Stat. at L.*, 275, as amended by Act of March 3, 1865, 14 *Id.*, 135), does not include a State. A railroad wholly owned by a State, managed by State agents, and the profits of which form a part of the revenue of the State, is not liable to taxation under such a law.

Demurrer to a bill in equity.

Mr. *Fitch*, United States District-Attorney, in support of the demurrer.

Messrs. *Law* and *Jackson*, for the complainants.

ERSKINE, J.—This is a bill in equity filed in this court by the State of Georgia against James Atkins, the defendant, collector of the fourth collection district of this State, under the Internal Revenue law of the United States ; praying that a writ of injunction may be granted to restrain the defendant from further proceeding in the collection of the sum of six thousand and four dollars and fifty-six cents, claimed to be due to the United States, under section 103 of that law, from the Western & Atlantic Railroad.

The bill alleges that this railroad is the property of the State of Georgia exclusively ; that the entire net income of this railroad forms a part of the revenue of

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the State, and is applied to the support of its government ; and that the superintendent is the mere agent of the State, and has no authority over the road or its income which is not specifically given to him by the act of the State. The following portion of the bill, showing its general scope and object, may be cited at length : "And your orator further complains, and says, heretofore, on the tenth day of May, eighteen hundred and sixty-six, the said James Atkins, collector of the internal revenue of the United States, as aforesaid, gave notice to Campbell Wallace, the superintendent of said railroad, that he, the said superintendent, should pay to him, the said collector, the sum of six thousand and four dollars and fifty-six cents (\$6,004.56), the said sum being demanded as revenue tax of the United States on six hundred and forty thousand one hundred and eighty-two dollars and forty-nine cents, gross earnings of said road for five months and two days, to the twenty-eighth day of February, eighteen hundred and sixty-six ; and that should he, the said superintendent, fail to make said payment by the twentieth day of May following, that he, the said collector, would issue and have levied upon said railroad and its property a distress warrant for said amount, with ten per cent. added thereto."

The defendant has demurred to the whole bill. This admits all the facts in the bill that are well pleaded.

From the view which I take of this suit, it will not be necessary to pass upon more than two of the questions discussed.

The first matter for inquiry is that of jurisdiction. The district court of the United States for the northern district of Georgia has, by the act of Congress approved August 11, 1848, 9 *Stat. at L.* 280, annexed to it the powers of a circuit court. The circuit courts of the United States are courts of special and limited juris-

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diction, deriving all their powers from the constitution and the acts of Congress.

I will briefly endeavor to ascertain whether this court has jurisdiction of the parties.

In the case of *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 *How.* 516, it was asserted in explicit language by Mr. Justice McLEAN, who delivered the opinion, and also by Mr. Chief Justice TANEY, in his dissenting opinion, that the suit might have been instituted in the circuit for the western district of Pennsylvania, instead of originally presenting it to the supreme court.

And as to the controversy : the first part of section 2 of the act of March 2, 1833, provides, "that the jurisdiction of the circuit courts of the United States shall extend to all cases in law and equity, arising under the revenue laws of the United States, for which other provisions are not already made by law." It will be observed that the jurisdiction here conferred by Congress does not depend upon the amount in dispute, nor the citizenship of the parties.

The case of *Cutting v. Gilbert*, assessor, and Shook, collector of the thirty-second collection district of the city of New York, was a suit in equity, instituted by the complainants in the circuit court of the United States for the southern district of New York, for themselves, as well as all others in interest who might come in, &c., against the defendants, to enjoin the assessment and collection of a tax claimed by those officers to be due to the United States under section 99 of the National Internal Revenue law, for bonds, stocks, &c., bought and sold by claimants, as licensed brokers and bankers. Because, among other things, of the joinder of improper parties, the injunction was denied by the court, and the parties left to their remedy at law. But Mr. Justice NELSON, in delivering the opinion, said : "The second section of the act of Congress of March 2,

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1833, known as the Force Act, confers jurisdiction in express terms, and which has been applied to this act by its fiftieth section. And jurisdiction had previously, and has since, been upheld and exercised upon general principles of equity jurisprudence." 9 *Wheat.* 739, 903 ; 16 *How.* 369 ; 18 *Id.* 331 ; 1 *Black*, 436 ; Pamphlet, containing argument of Mr. Courtney, United States District-Attorney, in behalf of the defendants, and the decision of Judge NELSON, p. 27, New York, 1865.

The preceding extract is a direct authority on the question under immediate consideration ; and, for myself, I entertain no doubt whatever of the jurisdiction or power of this Court, if the tax sought to be collected is illegal, unwarranted by the act of Congress, to interpose by writ of injunction, and arrest the threatened invasion of the property of the complainant.

One other question only need be the subject of examination, and that is whether, under the internal revenue laws, it was the intention of Congress that a duty or tax should be collected out of the property owned, controlled, and managed solely by a State ; for it is admitted in the pleadings that the Western and Atlantic Railroad is the property of the State of Georgia, exclusively, and that the net income arising from the road is revenue applied to the support of the government of the State. Section 103 of the act of Congress of June 30, 1864, 13 *Stat. at L.* 275, as amended by that of March 3, 1865, 14 *Id.* 135, declares "that every person, firm, company, or corporation, owning or possessing or having the care and management of any railroad, canal, steamboat, ship," &c., engaged or employed in the business of transporting passengers or property for hire, or in transporting the mails of the United States," . . . "shall be subject to and pay a duty of two and one-half per centum upon the gross receipts of such railroad, canal, steamboat, ship," &c. The question, narrowed to a

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point, is this: Does the word or term "corporation," for the purposes of this act, and as herein used, include the term "State?" The United States is formed of a number of States or commonwealths united together, and these constitute one general government. The State of Georgia is an integral and indissoluble part of the United States; but it is, nevertheless, in the meaning of the public law, a State. When the term "corporation" is applied to a nation or a State, it is employed in its most extensive signification; and thus used, the United States or commonwealths composing the Union may be termed "corporations." But when the term "corporation" is directed or refers to those artificial persons, bodies corporate or politic, instituted for the promotion or advancement of religion, learning, or commerce, and for various other objects, public or private, where charity, industry, skill, and speculation can be freely and advantageously employed, and which owe their existence, name, powers, and duration to a government, it is used in its ordinary, and, to the common understanding, explicit sense.

Is the former or the latter application of the term the fair and legitimate one intended by the act?

Now in order to arrive at the intention of the lawgiver the whole and every part of the statute should be considered in determining the meaning of any of its parts; taking the words to be understood in that sense in which they are generally used by those for whom the law was intended, and discarding all subtle and strained construction for the purpose of limiting or extending their operation or import. In the case of *Martin v. Hunter*, 1 *Wheat.* 326, Mr. Justice STORY, in delivering the opinion of the court, said that "words are to be taken in the natural and obvious sense, and not in a sense unreasonably re-

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stricted or enlarged." And in *Dunn v. Reid*, 10 *Pet.* 524, it was remarked by Mr. Justice McLEAN, in pronouncing the decision of the court, that "cases may be found where courts have construed a statute most liberally to effectuate the remedy ; but where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature." I am of the opinion that Congress intended the term "corporation," as used in this act, to be understood in its general, obvious, and natural meaning ; and, therefore, it does not include the term "State." And so far as my limited researches go, I am unable to discover a single case in the supreme court, or in any of the circuit or district courts of the United States, wherein it has been decided that the term "corporation"—body corporate or politic—when used in a statute, includes a "State," or where the one term is used as a synonym for the other.

It is therefore ordered that the demurrer be overruled ; and that the writ of injunction issue in accordance with the prayer of the complainant, upon giving bond in the sum of thirty thousand dollars.

Order accordingly.

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UNITED STATES v. RHODES.

Circuit Court, Seventh Circuit ; District of Kentucky, 1866.

INDICTMENT.—CIVIL RIGHTS BILL.—ITS CONSTITUTIONALITY.

An indictment need not aver the existence or the provisions of a public statute upon which the prosecution is founded.

An indictment for burglary in entering the house of T. in Kentucky, averred that T. was of African descent, and a citizen ; and that she was, by the laws of Kentucky, denied the right to testify against the defendants, they being white. There was a public statute of Kentucky, enabling white persons under similar circumstances to testify. *Held*, that the indictment was sufficient, and that the circuit court might take jurisdiction under section 3 of the act of April 9, 1866, 14 *Stat. at L.* 27, known as the "civil rights" bill, notwithstanding there was no averment of the statute of Kentucky. The circuit court should take judicial notice of such statute, and the indictment should be construed in the same manner as if the statute were averred.

A prosecution for burglary is "a cause affecting" the owner of the building entered, within the meaning of section 3 of the civil rights bill, giving the courts of the Union jurisdiction of *all causes affecting persons* who cannot enforce in the courts of the State any of the rights secured to them by the first section. If the owner of the building entered, is, on account of color, incompetent, by the law of the State where the offense is alleged to have been committed, to testify in support of the indictment as a white person might, the circuit court has jurisdiction.

The criminal jurisdiction conferred upon the circuit and district courts by section 3 of the civil rights bill, is not confined to offenses committed by colored persons. It extends to prosecutions against white persons for offenses affecting persons who cannot enforce in the State courts the rights secured to them by section 1.

The civil rights bill is not a penal statute. It is a remedial one, and is to be liberally construed.

The history of the adoption of the first thirteen amendments to the

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constitution, and the objects and proper construction of them, explained.

Free persons of color, born within the allegiance of the United States, are citizens; and have always been entitled to be so regarded.

The *dicta* to the contrary, in *Scott v. Sanford*, 19 *How.* 393, disapproved.

The emancipation of a native born slave, by the thirteenth amendment, removed the disability of slavery, and made him a citizen of the United States; subject, however, to any lawful restrictions imposed upon his right to vote, or other powers or privileges.

The act of April 9, 1866, 14 *Stat. at L.* 27, known as the "civil rights" bill, is constitutional in all its provisions. It is an appropriate method of exercising the power conferred on Congress by the thirteenth amendment.

Motion in arrest of judgment.

SWAYNE, J.—This is a prosecution under the act of Congress of the 9th of April, 1866, entitled "An Act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication." The defendants having been found guilty by a jury, the case is now before us upon a motion in arrest of judgment.

Three grounds are relied upon in support of the motion. It is insisted :

I. That the indictment is fatally defective.

II. That the case which it makes, or was intended to make, is not within the act of Congress upon which it is founded.

III. That the act itself is unconstitutional and void.

I. As to the indictment, if either count be sufficient, it will support the judgment of the court upon the verdict. Our attention will be confined to the second count. That count alleges that the defendants, being white persons, "On the 1st of May, 1866, at the county of Nelson, in the State and district of Kentucky, at the hour of eleven of the clock in the night of the same day, feloniously and burglariously did break

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and enter the dwelling house there situate of Nancy Talbot, a citizen of the United States of the African race, having been born in the United States, and not subject to any foreign power, who was then and there, and is now, denied the right to testify against the said defendants, in the courts of the State of Kentucky, and of the said county of Nelson, with intent the goods and chattels, moneys and property of the said Nancy Talbot, in the said dwelling house then and there being, feloniously and burglariously to steal, take, and carry away, contrary to the statute in such case made and provided, and against the peace and dignity of the United States."

The objection urged against this count is, that it does not aver that "white citizens" enjoy the right which it is alleged is denied to Nancy Talbot. This fact is vital in the case. Without it our jurisdiction cannot be maintained. It is averred that she is a citizen of the United States, of the African race, and that she is denied the right to testify against the defendants, they being white persons. Section 669 of the Code of Civil Practice of Kentucky gives this right to white persons under the same circumstances. This is a public statute, and we are bound to take judicial cognizance of it. It is never necessary to set forth matters of law in a criminal pleading. The indictment is, in legal effect, as if it averred the existence and provisions of the statute. The enjoyment of the right in question by white citizens is a conclusion of law from the facts stated. Averment and proof could not bring it into the case more effectually for any purpose than it is there already. 1 *Chitt. Cr. Law*, 188; 2 *Bos. & P.* 127; 2 *Leach*, 942; 1 *Bishop Crim. Pro.*, §§ 52, 53.

This right is one of those secured to Nancy Talbot by the first section of this act. The objection to this count cannot be sustained.

II. Is the offense charged, within the statute?

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The first section enacts:—"That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery," "shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The second section provides:—"That any person, who under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in the condition of slavery," "or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor," &c.

The third section declares:—"That the district courts of the United States within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, *affecting* persons who are denied or cannot enforce in the courts or judicial tribunals of the State where they may be, any of the rights secured to them by the first section of this

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act ; and if any suit or prosecution, civil or criminal, shall be commenced in any State court against such person, for any cause whatsoever," . . . "such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the act relating to *habeas corpus*, and regulating judicial proceedings in certain cases, approved March 3, 1863, and all acts amendatory thereof."

It will be observed that jurisdiction is given to this court "of all causes, civil and criminal," affecting persons who are denied or cannot enforce in the local State courts "*any* of the rights secured by the first section of this act." The denial of any one is as effectual as the denial of any other or of all. But it is said the cause set forth in the indictment is not one *affecting* Nancy Talbot, in the sense of the law, and that therefore this court has no jurisdiction. United States v. Ortega, 11 *Wheat.* 467, is relied upon as authority for this proposition. That case is as follows : The Constitution provides, Art. 3, § 2, that—

"In all cases *affecting* ambassadors, other public ministers and consuls and those in which a State shall be a party, the supreme court shall have original jurisdiction."

Ortega was indicted in the circuit court for "infracting the law of nations by offering violence to the person" of Salmon, the charge d'affaires of Spain in the United States. The judges of the circuit court were opposed in opinion upon two questions, which were thereupon certified to the supreme court.

They were :

- (1.) Whether the case was one affecting a public minister within the meaning of the Constitution ;
- (2.) And whether in such cases the jurisdiction of the supreme court is exclusive ?

The supreme court decided only the first question.

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It was held that the case did not *affect* the charge d'affaires. This rendered it unnecessary to decide the other question, and it is still unsettled.

It will be observed that the language of the statute is different. It is "*causes*, civil and criminal," and not "*cases*."

BURRELL, in his *Law Dictionary*, thus defines CAUSE:

"The origin or foundation of a thing, as of a suit or action; a ground of action. 1 *Const.*, 470."

The phrase "causes, civil and criminal," must be understood in the sense of *causes of civil action* and *causes of criminal prosecution*. These do unquestionably affect the plaintiff in the one case, and the party against whose person or property the crime is committed in the other.

The soundness and authority of the judgment in the case of *Ortega* are not questioned; but it is by no means true, as a universal proposition, that none are *affected* in the legal sense of the term, by a *case*, but those who are parties to the record. The solution of the question must always depend upon the circumstances.

In *Osborn v. Bank of the United States*, 9 *Wheat.* 584, the court said:

"If a suit be brought against a foreign minister, the supreme court has original jurisdiction, and this is shown in the record; but suppose a suit be brought which *affects* the interests of a foreign minister, or by which his servant, or his secretary, becomes a party to the suit, but the actual defendant pleads to the jurisdiction and asserts his privilege. If the suit *affects* a foreign minister it must be dismissed; not because he is a party to it, but because it *affects* him."

It may be asked, what is—if this is not—the proper construction of the statute?

It has been answered that none are *affected* in criminal cases but the sovereign prosecuting and the defen-

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dants ; and that hence colored persons only can be prosecuted under its provisions.

When the act was passed there was no State where ample provision did not exist for the trial and punishment of persons of color for all offenses ; and no locality where there was any difficulty in enforcing the law against them. There was no complaint upon the subject. The aid of Congress was not invoked in that direction. It is not denied that the first and second sections were designed solely for their benefit. The third section, giving the jurisdiction to which this question relates, provides expressly that if sued or prosecuted in a State court under the circumstances mentioned, they may at once have the cause certified into a proper Federal court.

The fourth section requires district-attorneys, marshals and their deputies, commissioners, agents of the freedmen's bureau, and other officers specially empowered by the President, to institute proceedings at the expense of the United States, against all persons violating the provisions of the act ; and "with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude," it is made the duty of circuit courts of the United States to increase the number of their commissioners.

The fifth section imposes a heavy fine on marshals who shall refuse to receive or neglect to execute any process issued under the act ; and it authorizes commissioners to appoint persons to serve such process issued by them.

The sixth section renders liable to fine and imprisonment any person who shall obstruct an officer or other person in the execution of such process ; or who shall aid a person arrested to escape ; or conceal a person for whose arrest a warrant has been issued.

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Section eight authorizes the President to direct the judge, marshal, and district-attorney to attend at such place and for such time as he may designate, "for the purpose of the more speedy arrest and trial of persons charged with violations of this act."

The ninth section authorizes the President to employ such part of the land and naval forces of the United States, and of the militia, as shall be necessary to "prevent the violation and enforce the due execution of this act."

It is incredible that all this machinery, including the agency of the freedmen's bureau, would have been provided, if the intention were to limit the criminal jurisdiction conferred by the third section to colored persons, and exclude all white persons from its operation.

The title of the act is in harmony with this view of the subject.

The construction contended for would obviously defeat the main object which Congress had in view in passing the act, and produce results the opposite of those intended.

The difficulty was that where a white man was sued by a colored man, or was prosecuted for a crime against a colored man, colored witnesses were excluded. This in many cases involved a denial of justice. Crimes of the deepest dye were committed by white men with impunity. Courts and juries were frequently hostile to the colored man, and administered justice, both civil and criminal, in a corresponding spirit. Congress met these evils by giving to the colored man everywhere the same right to testify "as is enjoyed by white citizens," abolishing the distinction between white and colored witnesses, and by giving to the courts of the United States jurisdiction of all causes, civil and criminal, which concern him, wherever the right to testify as

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if he were white is denied to him or cannot be enforced in the local tribunals of the State.

The context and the rules of interpretation to be applied permit of no other construction. Such was clearly the intention of Congress, and that intention constitutes the law.

This, with the provision which authorizes colored defendants in the State courts to have their causes certified into the Federal courts, and the other provisions referred to, renders the protection which Congress has given as effectual as it can well be made by legislation. It is one system, all the parts looking to the same end.

Where crime is committed with impunity by any class of persons, society, so far as they are concerned, is reduced to that condition of barbarism which compels those unprotected by other sanctions to rely upon physical force for the vindication of their natural rights. There is no other remedy, and no other security.

It is said there can be no such thing as a right to testify, and that if Congress conferred it by this act, a cloud of colored witnesses may appear in every case and claim to exercise it.

There is no force in this argument. The statute is to be construed reasonably. Like the right to sue and to contract, it is to be exercised only on proper occasions and within proper limits. Every right given is to be the same "as is enjoyed by white citizens."

It is urged that this is a penal statute, and to be construed strictly. We regard it as remedial in its character, and to be construed liberally, to carry out the wise and beneficent purposes of Congress in enacting it. *Bacon's Abr.* tit. Statute, 1.

But if the act were a penal statute, the canons of interpretation to be applied would not affect the conclu-

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sion at which we have arrived. *United States v. Wiltberger*, 5 *Wheat.* 96; *Commonwealth v. Lowry*, 8 *Pick.* 374; *United States v. Morris*, 14 *Pet.*, 475; *United States v. Winn*, 3 *Sumn.* 211; 1 *Bish. Cr. Law*, 236.

This objection to the indictment cannot avail the defendants.

III. Is the act warranted by the Constitution?

The first eleven amendments of the Constitution were intended to limit the powers of the government which it created, and to protect the people of the States. Though earnestly sustained by the friends of the Constitution, they originated in the hostile feelings with which it was regarded by a large portion of the people, and were shaped by the jealous policy which those feelings inspired. The enemies of the Constitution saw many perils of evil in the center, but none elsewhere. They feared tyranny in the head, not anarchy in the members, and they took their measures accordingly. The friends of the Constitution desired to obviate all just grounds of apprehension, and to give repose to the public mind. It was important to unite, as far as possible, the entire people in support of the new system which had been adopted. They felt the necessity of doing all in their power to remove every obstacle in the way of its success. The most momentous consequences for good or evil to the country were to follow in the results of the experiment. Hence the spirit of concession which animated the convention, and hence the adoption of these amendments after the work of the convention was done and had been approved by the people.

The twelfth amendment grew out of the contest between Jefferson and Burr for the presidency.

The thirteenth amendment is the last one made. It trenches directly upon the power of the States and of the people of the States. It is the first and only in-

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stance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the States where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the Constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and with it forever the power to restore it. Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction.

The act of Congress confers citizenship. Who are citizens, and what are their rights? The Constitution uses the words "citizen" and "natural born citizens;" but neither that instrument nor any act of Congress has attempted to define their meaning. British jurisprudence, whence so much of our own is drawn, throws little light upon the subject. In *Johnson's Dictionary*, "citizen" is thus defined :

(1) "A freeman of a city; not a foreigner; not a slave; (2) a townsman, a man of trade; not a gentleman; (3) an inhabitant; a dweller in any place."

The definitions given by other English lexicographers are substantially the same. In *Jacob's Law Dictionary* (ed. of 1783), the only definition given is as follows :

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"Citizens (*cives*) of London are either freemen or such as reside and keep a family in the city, etc. ; and some are citizens and freemen, and some are not, who have not so great privileges as others. The citizens of London may prescribe against a statute, because their liberties are reinforced by statute." 1 *Roll.* 105.

BLACKSTONE and TOMLIN contain nothing upon the subject.

"The word *civis*, taken in the strictest sense, extends only to him that is entitled to the privileges of a city of which he is a member, and in that sense there is a distinction between a citizen and an inhabitant within the same city, for every inhabitant there is not a citizen." Scott *q. t. v.* Swartz, *Com.* 68.

"A citizen is a freeman who has kept a family in a city." Roy *v.* Hanger, 1 *Roll.* 138, 149.

"The term citizen, as understood in our law, is precisely analogous to the term subject, in the common law ; and the change of phrases has entirely resulted from the change of government. The sovereignty has been changed from one man to the collective body of the people, and he who before was *a subject of the king is now a citizen of the State.*" State *v.* Manuel, 4 *Dev. & Batt.*, 26.

In Shanks *v.* Dupont, 3 *Pet.* 247, the supreme court of the United States said :

"During the war each party claimed the allegiance of the natives of the colonies as due exclusively to itself. The Americans insisted upon the allegiance of all born within the States, respectively ; and Great Britain asserted an equally exclusive claim. The treaty of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American States, were virtually absolved from their allegiance to the British crown, and those who then adhered to the British

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crown, were deemed and held subjects of that crown. The treaty of peace was a treaty operating between the States on each side, and the inhabitants thereof; in the language of the seventh article, it was a 'firm and perpetual peace between his Britannic Majesty and the said States, *and between the subjects of one and the citizens of the other.*' Who then were *subjects* or *citizens* was to be decided by the state of facts. If they were originally subjects of Great Britain and then adhered to her and were claimed by her as subjects, the treaty deemed them such; if they were originally British subjects, but then adhering to the States, the treaty deemed them citizens."

All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons. 2 *Kent Com.*, 1; Calven's Case, 7 *Coke*, 1; 1 *Black. Com.*, 366; *Lynch v. Clark*, 1 *Sandf. Ch.* 139.

The common law has made no distinction on account of race or color. None is now made in England, nor in any other Christian country of Europe.

The fourth of the articles of confederation declared that the "free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the United States," &c. On the 25th of June, 1778, when these articles were under consideration by the Congress, South Carolina moved to amend this fourth article by inserting after the word

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"free" and before the word "inhabitants," the word "white." Two States voted for the amendment and eight against it. The vote of one was divided. *Scott v. Sanford*, 19 *How.*, 575. When the Constitution was adopted, free men of color were clothed with the franchise of voting in at least five States, and were a part of the people whose sanction breathed into it the breath of life. *Scott v. Sanford*, 19 *How.*, 573; *State v. Manuel*, 2 *Dev. & Batt.*, 24, 25.

"'Citizens' under our Constitution and laws means free inhabitants born within the United States or naturalized under the laws of Congress." 1 *Kent Com.*, 292, note.

We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.

It is further said in the note in 1 *Kent's Commentaries*, before referred to :

"If a slave born in the United States be manumitted or otherwise lawfully discharged from bondage, or if a black man born in the United States becomes free, he becomes thenceforward a citizen, but under such disabilities as the laws of the several States may deem it expedient to prescribe to persons of color."

In the case of *State v. Manuel*, *supra*, it was remarked :

"It has been said that by the Constitution of the United States, the power of naturalization has been conferred exclusively upon Congress, and therefore it cannot be competent for any State by its municipal regulations to make a citizen. But what is naturalization? It is the removal of the disabilities of alienage. Emancipation is the removal of the incapacity of slavery. The latter depends wholly upon the internal regulations of the State. The former belongs to the

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government of the United States. It would be dangerous to confound them." p. 25.

This was a decision of the supreme court of North Carolina, made in the year 1836. The opinion was delivered by Judge GASTON. He was one of the most able and learned judges this country has produced. The same court, in 1848, Chief Justice RUFFIN delivering the opinion, referred to the case of *State v. Manuel*, and said :

"That case underwent a very laborious investigation by both the bench and the bar. The case was brought here by appeal, and was felt to be one of very great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence upon all questions of similar nature." *State v. Newcomb*, 5 *Ired.* 253.

We cannot deny the assent of our judgment to the soundness of the proposition that the emancipation of a native born slave by removing the disability of slavery made him a citizen. If these views be correct, the provision in the act of Congress conferring citizenship was unnecessary, and is inoperative. Granting this to be so, it was well, if Congress had the power, to insert it, in order to prevent doubts and differences of opinion which might otherwise have existed upon the subject. We are aware that a majority of the court, in the case of *Scott v. Sanford*, arrived at conclusions different from those we have expressed. But in our judgment these points were not before them. They decided that the whole case, including the agreed facts, was open to their examination, and that *Scott* was a slave. This central and controlling fact excluded all other questions, and what was said upon them by those of the majority, with whatever learning and ability the argument was conducted, is no more binding upon this court as authority than the views of the minority upon the same subjects. *Carroll v. Carroll*, 16 *How.* 287.

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The fact that one is a subject or citizen determines nothing as to his rights as such. They vary in different localities and according to circumstances.

Citizenship has no necessary connection with the franchise of voting, eligibility to office, or indeed with any other rights, civil or political. Women, minors, and persons *non compos* are citizens, and not the less so on account of their disabilities. In England, not to advert to the various local regulations, the new reform bill gives the right of voting for members of Parliament to about eight hundred thousand persons from whom it was before withheld. There, the subject is wholly within the control of Parliament. Here, until the thirteenth amendment was adopted, the power belonged entirely to the States, and they exercised it without question from any quarter, as absolutely as if they were not members of the Union.

The first ten amendments to the Constitution, which are in the nature of a bill of rights, apply only to the national government. They were not intended to restrict the power of the States. *Barrows v. Mayor, &c.*, 7 *Pet.* 247 ; *Withers v. Buckley*, 20 *How.* 84 ; *Murphy v. People*, 2 *Cow.* 818.

Our attention has been called to several treaties by which Indians were made citizens ; to those by which Louisiana, Florida, and California were acquired, and to the act passed in relation to Texas. All this was done under the war and treaty making powers of the Constitution, and those which authorize the national government to regulate the territory and other property of the United States, and to admit new States into the Union. *American Ins. Co. v. Canter*, 1 *Pet.* 511 ; *Cross v. Harrison*, 16 *How.* 164 ; 2 *Story Const.* 158.

These powers are not involved in the question before us, and it is not necessary particularly to consider them. A few remarks, however, in this connection will not be out of place. A treaty is declared by the Con-

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stitution to be the "law of the land." What is unwarranted or forbidden by the Constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered ; the government of the Union only such as the Constitution has given to it, expressly or incidentally, and by reasonable intentment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void.

"The power to make colored persons citizens has been actually exercised in repeated and important instances. See the treaty with the Choctaws of September 27, 1830, art. 14 ; with the Cherokees of May 20, 1836, art. 12 ; and the treaty of Gaudeloupe Hidalgo, of February 2, 1848, art. 8." *Scott v. Sanford*, 19 *How.* 486, *Opinion of* CURTIS, J.

See, also, the treaty with France of April 30, 1803, by which Louisiana was acquired, art. 3 ; and the treaty with Spain of the 23rd of February, 1819, by which Florida was acquired, art. 3.

The article referred to in the treaty with France and in the treaty with Spain is in the same language. In both the phrase "inhabitants" is used. No discrimination is made against those, in whole or in part, of the African race. So in the treaty of Guadeloupe Hidalgo (articles 8 and 9), no reference is made to color.

Our attention has been called to three provisions of the Constitution, besides the thirteenth amendment, each of which will be briefly adverted to.

1. Congress has power "to establish a uniform rule of naturalization." Art. 1, sec. 8. After consider-

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able fluctuations of judicial opinion, it was finally settled by the Supreme Court that this power is vested exclusively in Congress. *Collet v. Collet*, 2 *Dall.* 294 ; *United States v. Velati*, *Id.* 370 ; *Golden v. Prince*, 3 *Wash. C. Ct.* 313 ; *Chirac v. Chirac*, 2 *Wheat.* 259 ; *Houston v. Moore*, *Id.* 49 ; *Federalist*, No. 32.

An alien naturalized is "to all intents and purposes a natural born subject." *Co. Litt.* 129.

"Naturalization takes effect from *birth* ; denization from the date of the patent." *Vin. Abr.* tit. Alien, D.

Until the passage of a late act of Parliament, naturalization in England was effected by a special statute in each case. The statutes were usually alike. The form appears in *Godfrey v. Dickson*, *Cro. Jac.* 539, c. 7. Under the late act a resident alien may accomplish the object by a petition to the secretary of state for the home department.

The power is applicable only to those of foreign birth. Alienage is an indispensable element in the process. To make one of domestic birth a citizen is not naturalization, and cannot be brought within the exercise of that power. There is a universal agreement of opinion upon this subject. *Scott v. Sanford*, 19 *How.* 578 ; 2 *Story Const.* 44.

In the exercise of this power Congress has confined the law to *white persons*. No one doubts their authority to extend it to all aliens, without regard to race or color. But they were not bound to do so. As in other cases, it was for them to determine the extent and the manner in which the power given should be exercised. They could not exceed it, but they were not bound to exhaust it. It was well remarked by one of the dissenting judges, in *Scott v. Sanford*, 19 *How.* 586, in regard to the African race :

"The Constitution has not excluded them, and since that has conferred on Congress the power to naturalize colored aliens, it certainly shows color is not

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a necessary qualification for citizenship under the Constitution of the United States."

It may be added that before the adoption of the Constitution, the States possessed the power of making both those of foreign and domestic birth citizens, according to their discretion. This power, as to the former, they surrendered. They did not as to the latter, and they still possess it.

"The powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Const. Amend't. X.*

What the several States under the original Constitution only could have done, the nation has done by the thirteenth amendment. An occasion for the exercise of this power by the States may not, perhaps cannot, hereafter arise.

2. "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *Const. Art. XIV. § 2.*

This provision of the Constitution applies only to citizens going from one State to another.

"It is obvious that if the citizens of each State were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as other aliens."

"The intention of this clause was to confer on them, as one may say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the same circumstances." 2 *Story Const.* § 187.

Chancellor KENT says :

"If citizens remove from one State to another, they are entitled to the privileges that persons of the same description are entitled to in the States to which the removal is made, and to none other." 2 *Kent Com.* 36.

This provision does not bear particularly upon the

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question before us, and need not be further considered.

3. "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature cannot be convened), against domestic violence." Art. IV. § 4.

Mr. Justice STORY, adopting the language of the *Federalist*, says :

"That but for this power a successful faction might erect a tyranny on the ruins of order and law, while no succor could be constitutionally afforded by the Union to the friends and supporters of the government." . . . "But a right implies a remedy, and where else could the remedy be deposited than where it is deposited by the Constitution ?" 2 *Story Const.*, 559, 560.

This topic is foreign to the subject before us. We shall not pursue it further.

Congress, in passing the act under consideration, did not proceed upon this ground. It is not the theory or purpose of that act to apply the appropriate remedy for such a state of things.

The constitutionality of the act cannot be sustained under this section.

This brings us to the examination of the thirteenth amendment. It is as follows :

"Article XIII. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Before the adoption of this amendment, the Constitution, at the close of the enumeration of the powers of Congress, authorized that body—

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"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof."

In *McCullough v. Maryland*, 4 *Wheat.* 421-423, Chief Justice MARSHALL used the phrase "appropriate" as the equivalent and exponent of "necessary and proper" in the preceding paragraph.

He said: "Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." "To use one" (a bank) "must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government." "But were its necessity less apparent" (the bank of the United States), "none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been justly observed, is to be discussed in another place."

Pursuing the subject, he added:

"When the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Judge STORY says:

"In the practical application of government, then, the public functionaries must be left at liberty to exercise the powers with which the people, by the Constitution and laws, have entrusted them. They must have a wide discretion as to the choice of means; and the only limitation upon the discretion would seem to

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be that the means are *appropriate* to the end ; and this must admit of considerable latitude, for the relation between the action and the end, as has been justly remarked, is not always so direct and palpable as to strike the eye of every observer. If the end be legitimate, and within the scope of the Constitution, all the means which are *appropriate*, and which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect." 1 *Story Const.* § 432.

These passages show the spirit in which the amendment is to be interpreted, and develop fully the principles to be applied. Before proceeding further, it would be well to pause and direct our attention to what has been deemed appropriate in the execution of some of the other powers confided to Congress in like general terms.

(1.) "The power to lay and collect taxes, duties, and imposts."

This includes authority to build custom houses ; to employ revenue cutters ; to appoint the necessary collectors and other officers ; to take bonds for the performance of their duties ; to establish the needful bureaus ; to prescribe when, how, and in what the taxes and duties shall be paid ; to rent or build warehouses for temporary storing purposes ; to define all crimes relating to the subject in its various ramifications, with their punishment ; and to provide for their prosecution.

(2.) "To regulate commerce with foreign nations, among the several States, and with the Indian tribes."

This carries with it the power to build and maintain lighthouses, piers, and breakwaters ; to employ revenue cutters ; to cause surveys to be made of coasts, rivers, and harbors ; to appoint all necessary officers, at home and abroad ; to prescribe their duties, fix their terms of office and compensation ; and to define and punish all

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crimes relating to commerce within the sphere of the Constitution. *United States v. Coombs*, 12 *Pet.* 72; *United States v. Holliday*, 3 *Wall.* 407.

(3.) "To establish post-offices and post-roads."

This gives authority to appoint a postmaster-general, and local postmasters throughout the country; to define their duties and compensation; to cause the mails to be carried by contract, or by the servants of the department, to all parts of the States and Territories of the Union, and to foreign countries, and to punish crimes relating to the service, including obstructions to those engaged in transporting the mail while in the performance of their duty. The mail penal code comprises more than fifty offenses. All of them rest for their necessary constitutional sanction upon this power, thus briefly expressed.

(4.) "To raise and support armies."

This includes the power to enlist such number of men for such periods and at such rates of compensation as may be deemed proper; to provide all the necessary officers, equipments, and supplies, and to establish a military academy, where are taught military and such other sciences and branches of knowledge as may be deemed expedient, in order to prepare young men for the military service.

(5.) "To provide and maintain a navy."

This authorizes the government to buy or build any number of steam or other ships of war, to man, arm, and otherwise prepare them for war, and to dispatch them to any accessible part of the globe. Under this power the naval academy has been established. *United States v. Beavan*, 3 *Wheat.* 390.

These are but a small part of the powers which are incidental and appropriate to the main powers expressly granted. It is Utopian to believe that without such constructive powers, the powers expressed can be so executed as to meet the intentions of the framers

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of the Constitution, and to accomplish the objects for which governments are instituted. The Constitution provides expressly for the exercise of such powers to the full extent that may be "necessary and proper." No other limitation is imposed. Without this provision, the same result would have followed. The means of execution are inherently and inseparably a part of the power to be executed.

The Constitution declares that "the senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath to support this Constitution." No other oath is required, "yet he would be charged with insanity who would contend that the legislature might not superadd to the oath directed by the Constitution such other oath of office as its wisdom might suggest." *McCulloch v. Maryland*, 4 *Wheat.* 416.

The Bank of the United States, with all its faculties, was sustained because it was "convenient" and "appropriate" for the government in the management of its fiscal affairs. 4 *Wheat.* 316.

Perhaps no measures of the national government have involved more doubt of their constitutionality than the acquisition of Louisiana and the embargo. Both were carried through Congress by those who had been most strenuous for a strict construction of the Constitution. Mr. JEFFERSON thought the former *ultra vires*, and advised an amendment of the Constitution, but expressed a willingness to acquiesce if his friends should entertain a different opinion. 2 *Story Const.* 160.

The second Bank of the United States was a measure of the same class of thinkers. The acquisition of Florida involved the same question of constitutional power as the acquisition of Louisiana. It was univer-

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sally acquiesced in ; and the constitutional question was not raised.

It is an axiom in our jurisprudence, that an act of Congress is not to be pronounced unconstitutional unless the defect of power to pass it is so clear as to admit of no doubt. Every doubt is to be resolved in favor of the validity of the law.

"The opposition between the Constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other." *Fletcher v. Peck*, 6 *Cranch*, 128.

"The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated." *Cooper v. Telfair*, 4 *Dall.* 18.

"A remedial power in the Constitution is to be construed liberally." *Chisholm v. Georgia*, 2 *Dall.* 476.

"Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." *Prigg v. Commonwealth of Pennsylvania*, 16 *Pet.* 60.

Since the organization of the supreme court, but three acts of Congress have been pronounced by that body void for unconstitutionality. *Marbury v. Madison*, 1 *Cranch*, 137 ; *Scott v. Sanford*, 19 *How.* 393 ; *Exp. Garland*, 4 *Wall.* 334.

The present effect of the amendment was to abolish slavery wherever it existed within the jurisdiction of the United States. In the future it throws its protection over every one, of every race, color, and condition within that jurisdiction, and guards them against the recurrence of the evil. The Constitution, thus amended, consecrates the entire territory of the republic to freedom, as well as to free institutions. The

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amendment will continue to perform its function throughout the expanding domain of the nation, without limit of time or space. Present possessions and future acquisitions will be alike within the sphere of its operation.

Without any other provision than the first section of the amendment, Congress would have had authority to give full effect to the abolition of slavery thereby decreed. It would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needful for that purpose. The second section of the amendment was added out of abundant caution. It authorizes Congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase which had been enlightened by well-considered judicial application. Any exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded, that the judicial power can be invoked. Its office, then, is to repress and annul the excess ; beyond that it is powerless.

We will now proceed to consider the state of things which existed before and at the time the amendment was adopted, the mischiefs complained of or apprehended, and the remedy intended to be provided for existing and anticipated evils.

When the late civil war broke out, slavery of the African race subsisted in fifteen States of the Union. The legal code relating to persons in that condition was everywhere harsh and severe. An eminent writer said : " They cannot take property by descent or purchase ; and all they find and all they own belongs to their master. They cannot make contracts, and they are deprived of civil rights. They are assets for the payment of debts, and cannot be emancipated by will

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or otherwise to the prejudice of creditors." 2 *Kent Com.* 281, 282.

In a note, it is added :

"In Georgia, by an act of 1829, no person is permitted to teach a slave, a negro, or a free person of color to read or write. So in Virginia, by a statute of 1830, meetings of free negroes to learn reading or writing are unlawful, and subject them to corporal punishment ; and it is unlawful for white persons to assemble with free negroes or slaves to teach them to read or write. The prohibitory act of the legislature of Alabama, passed at the session of 1831-2, relative to the instruction to be given to the slaves or free colored population, or exhortation, or preaching to them, or any mischievous influence attempted to be exerted over them, is sufficiently penal. Laws of similar import are presumed to exist in the other slaveholding States, but in Louisiana the law on the subject is armed with ten-fold severity. It not only forbids any person teaching slaves to read or write, but it declares that any person using language in any public discourse from the bar, bench, stage, or pulpit, or any other place, or in any private conversation, or making use of any sign or actions having a tendency to produce discontent among the free colored population or insubordination among the slaves, or who shall be knowingly instrumental in bringing into the State any paper, book, or pamphlet having a like tendency, shall, on conviction, be punishable with imprisonment or death, at the discretion of the court."

Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave States. Many of the badges of the bondman's degradation

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were fastened upon them. Their condition, like his, though not so bad, was helpless and hopeless. This is borne out by the passages we have given from *Kent's Commentaries*. Further research would darken the picture. The States had always claimed and exercised the exclusive right to fix the *status* of all persons living within their jurisdiction.

On January 1, 1863, President Lincoln issued his proclamation of emancipation. Missouri and Maryland abolished slavery by their own voluntary action. Throughout the war the African race had evinced entire sympathy with the Union cause. At the close of the rebellion two hundred thousand had become soldiers in the Union armies. The race had strong claims upon the justice and generosity of the nation. Weighty considerations of policy, humanity, and right were superadded. Slavery, in fact, still subsisted in thirteen States. Its simple abolition, leaving these laws and this exclusive power of the States over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to Congress the requisite authority, and to leave no room for doubt or cavil upon the subject. The results have shown the wisdom of this forecast. Almost simultaneously with the adoption of the amendment this course of legisla-

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tive oppression was begun. Hence, doubtless, the passage of the act under consideration. In the presence of these facts, who will say it is not an "*appropriate*" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.

It would be a remarkable anomaly if the national government, without this amendment, could confer citizenship on aliens of every race or color, and citizenship, with civil and political rights, on the "inhabitants" of Louisiana and Florida, without reference to race or color, and can not, with the help of the amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them.

It was passed by the Congress succeeding the one which proposed the amendment. Many of the members of both houses were the same.

This fact is not without weight and significance. *McCulloch v. Maryland*, 4 *Wheat.* 401.

The amendment reversed and annulled the original policy of the Constitution, which left it to each State to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. The whites needed no relief or protection, and they are practically unaffected by the amendment. The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects as to every one within its scope, than the consequences of a manumission by a private individual.

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We entertain no doubt of the constitutionality of the act in all its provisions.

It gives only certain civil rights. Whether it was competent for Congress to confer political rights also, involves a different inquiry. We have not found it necessary to consider the subject.

We are not unmindful of the opinion of the court of appeals of Kentucky, in the case of *Brown v. Commonwealth*. With all our respect for the eminent tribunal from which it proceeded, we have found ourselves unable to concur in its conclusions. The constitutionality of the act is sustained by the supreme court of Indiana, and the chief justice of the court of appeals of Maryland, in able and well-considered opinions. *Smith v. Moody*, 26 *Ind.* 299 ; *Re A. H. Somers*.

We are happy to know that if we have erred the supreme court of the United States can revise our judgment and correct our error.

The motion is overruled, and judgment will be entered upon the verdict.

Motion overruled.

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SHORTRIDGE v. MACON.

Circuit Court, Fourth Circuit; District of North Carolina, June T., 1867.

PAYMENT.—SEQUESTRATION ACTS.

The fact that, during the civil war of 1861-65, a citizen of one of the self-styled Confederate States, being indebted to a citizen of a loyal State, was compelled to pay, and did pay the amount of the demand into the treasury of the Confederate State, under a statute of that State for the sequestration of estates of alien enemies, forms no defense to an action brought by the creditor, in a court of the United States, since the war was terminated, to recover the demand.

The acts of citizens of the Confederate States, before and during the civil war, setting aside the previous State governments, uniting in the confederation, and making war upon the United States, were never operative to accomplish a separation of such States from the Union; nor can they discharge a citizen of one of those States from any duty, or relieve him from any responsibility.

The levying war against the United States, committed by the citizens of the Confederate States, was treason against the United States. Neither the pretended acts of secession, nor the magnitude or formidable character of the war, could modify the offense, or constitute a Confederate State government *de facto*, so as to create civil rights which could outlast the war.

CHASE, Ch. J.—This is an action for the recovery of the amount of a promissory note, with interest. There is no question of the liability of the defendant to the demand of the plaintiffs, unless he is excused by coerced payment of the note sued upon under an act of the self-styled Confederate Congress, passed August 30, 1861, entitled "An Act for the sequestration of the estates of alien enemies," and an amendatory act passed February 15, 1862.

It is admitted that the plaintiffs were citizens of

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Pennsylvania ; that the defendant was a citizen of North Carolina ; that the note sued upon was made by the defendant to the plaintiffs ; and that the defendant was compelled by proceedings instituted in the courts of the so-called Confederate States to pay the amount due upon it to the receiver appointed under the sequestration acts.

Upon these facts it is insisted that the defendant is discharged from his liability to the plaintiffs. It is claimed that, while it existed, the Confederate government was a *de facto* government ; that the citizens of the States which did not recognize its authority were aliens, and, in time of war, alien enemies ; that, consequently, the acts of sequestration were valid acts ; and, therefore, that payment to a Confederate agent, of debts due to such citizens, if compelled by proceedings under those acts, relieved the debtors from all obligations to the original creditors.

To maintain these propositions the counsel for the defendant rely upon the decisions of the supreme court of the United States to the effect that the late rebellion was a civil war, in the prosecution of which belligerent rights were exercised by the national government and accorded to the armed forces of the rebel confederacy ; and upon the decisions of the State courts during and after the close of the American war for independence, which affirmed the validity of confiscations and sequestrations decreed against the property of non-resident British subjects and the inhabitants of colonies or States hostile to the United Colonies or United States.

But these decisions do not, in our judgment, sustain the propositions in support of which they are cited.

There is no doubt that the State of North Carolina, by the acts of the convention of May, 1861 ; by the previous acts of the governor of the State ; by subsequent acts of all the departments of the State government,

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and by the acts of the people at the elections held after May, 1861, set aside her State government and constitution, connected, under the national constitution, with the government of the United States, and established a constitution and government connected with another pretended government set up in hostility to the United States, and entered upon a course of active warfare against the national government. Nor is there any doubt that, by these acts, the practical relations of North Carolina to the Union were suspended, and very serious liabilities incurred by those who were engaged in them.

But these acts did not effect, even for a moment, the separation of North Carolina from the Union, any more than the acts of an individual who commits grave offenses against the State by resisting its officers and defying its authority can separate him from the State. Such acts may subject the offender even to outlawry, but can discharge him from no duty nor relieve him from any responsibility.

The national constitution declares that "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort."

The word "only" was used to exclude from the criminal jurisprudence of the new republic the odious doctrines of constructive treason. Its use, however, while limiting the definition to plain overt acts, brings these acts into conspicuous relief, as being always and in essence treasonable.

War, therefore, levied against the United States by citizens of the republic, under the pretended authority of the new State government of North Carolina, or the new central government which assumed the title of the "Confederate States," was treason against the United States.

It has been supposed, and by some strenuously

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maintained, that the North Carolina ordinance of 1861, which purported to repeal the North Carolina ordinance of 1789 by which the Constitution of the United States was ratified, and to repeal also all subsequent acts by which the assent of North Carolina was given to amendments of the Constitution, did, in fact, repeal that ordinance and those acts, and thereby absolved the people of the State from all obligation as citizens of the United States, and made it impossible to commit treason by levying war against the national government.

No elaborate discussion of the theoretical question thus presented seems now to be necessary. That question, as a practical one, is at rest, and is not likely to be revived. It is enough to say here, that, in our judgment, the answer which it has received from events is that which the soundest construction of the Constitution warrants and requires.

Nor can we agree with some persons, distinguished by abilities and virtues, who insist that when rebellion attains the proportions and assumes the character of civil war, it is purged of its treasonable character, and can only be punished by the defeat of its armies, the disappointment of its hopes, and the calamities incident to unsuccessful war.

Courts have no policy. They can only declare the law.

On what sound principle, then, can we say judicially that the levying of war ceases to be treason when the war becomes formidable? That, though war levied by ten men or ten hundred men is certainly treason, it is no longer such when levied by ten thousand or ten hundred thousand? That the armed attempts of a few, attended by no serious danger to the Union, and suppressed by slight exertions of the public force, come unquestionably within the constitutional definition; but attempts by a vast combination, controlling several

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States, putting great armies in the field, menacing with imminent peril the very life of the republic, and demanding immense efforts and immense expenditure of treasure and blood for their defeat and suppression, swell beyond the boundaries of the definition, and become innocent in the proportion of their enormity ?

But it is said that this is the doctrine of the supreme court. We think otherwise.

In modern times it is the usual practice of civilized governments, attacked by organized and formidable rebellion, to exercise and concede belligerent rights. Instead of punishing rebels, when made prisoners in war, as criminals, they agree on cartels for exchange, and make other mutually beneficial arrangements ; and instead of insisting upon offensive terms and designations in intercourse with the civil or military chiefs, treat them, as far as possible without surrender of essential principles, like foreign foes engaged in regular warfare.

But these concessions are made by the legislative and executive departments of government in the exercise of political discretion, and in the interest of humanity, to mitigate vindictive passions inflamed by civil conflicts, and prevent the frightful evils of mutual reprisals and retaliations. They establish no rights, except during the war.

It is true that when war ceases, and the authority of the regular government is fully re-established, the penalties of violated law are seldom inflicted upon the many.

Wise governments never forget that the criminality of individuals is not always or often equal to that of the acts committed by the organization with which they are connected. Many are carried into rebellion by sincere though mistaken convictions, or hurried along by excitements due to social and State sympathies, and even by the compulsion of a public opinion not their own.

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When the strife of arms is over, such governments, therefore, exercising still their political discretion, address themselves mainly to the work of conciliation and restoration, and exert the prerogative of mercy rather than that of justice. Complete remission is usually extended to large classes by amnesty, or other exercise of legislative or executive authority ; and individuals not included in these classes, excepting sometimes a few of the greatest offenders, are absolved by pardon, either absolutely or upon conditions prescribed by the government.

These principles, common to all civilized nations, are those which regulated the action of the government of the United States during the war of the rebellion, and have regulated its action since rebellion laid down its arms.

In some respects the forbearance and liberality of the nation have exceeded all example. While hostilities were yet flagrant, one act of Congress practically abolished the death penalty for treason subsequently committed, and another provided a mode in which citizens of rebel States maintaining a loyal adhesion to the Union could recover, after the war, the value of their captured or abandoned property.

The national government has steadily sought to facilitate restoration with adequate guarantees of union, order, and equal rights.

On no occasion, however, and by no act have the United States ever renounced their constitutional jurisdiction over the whole territory, or over all the citizens of the republic, or conceded to citizens in arms against their country the character of alien enemies, or to their pretended government the character, generally, of a *de facto* government.

In the prize cases the supreme court simply asserted the right of the United States to treat the insurgents as belligerents, and to claim from foreign nations the per-

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formance of neutral duties under the penalties known to international law. The decision recognized, also, the fact of the exercise and concession of belligerent rights, and affirmed, as a necessary consequence, the proposition that during the war all the inhabitants of the country controlled by the rebellion and all the inhabitants of the country loyal to the Union were enemies reciprocally each of the other. But there is nothing in that opinion which gives countenance to the doctrine which counsel endeavor to deduce from it: that the insurgent States, by the act of rebellion and by levying war against the nation, became foreign States, and their inhabitants alien enemies.

This proposition being denied, it must result that in compelling debtors to pay to receivers, for the support of the rebellion, debts due to any citizen of the United States, the insurgent authorities committed illegal violence, by which no obligation of debtors to creditors could be cancelled, or, in any respect, affected.

Nor can the defense in this case derive more support from the decisions affirming the validity of confiscations during the war for American independence.

That war began, doubtless, like the recent civil war, in rebellion. Had it terminated unsuccessfully, and had English tribunals subsequently affirmed the validity of colonial confiscation and sequestration of British property, and of debts due to British subjects, those decisions would be in point. No student of international law or of history needs to be informed how impossible it is that such decisions could have been made.

Had the recent rebellion proved successful, and had the validity of the confiscations and sequestrations actually enforced by the insurgent authorities been afterwards questioned in Confederate courts, it is not improbable that the decisions of the State courts made during and after the revolutionary war might have been cited with approval.

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But it hardly needs remark that those decisions were made under widely different circumstances from those which now exist.

They were made by the courts of States which had succeeded in their attempt to sever their colonial connection with Great Britain, and sanctioned acts which depended for their validity wholly upon that success, and can have no application to acts of a rebel government seeking the severance of constitutional relations of States to the Union, but defeated in the attempt, and itself broken up and destroyed.

Those who engage in rebellion must expect the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of law, and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed.

We hold, therefore, that compulsory payment under the sequestration acts to the rebel receiver, of the debt due to the plaintiffs from the defendant, was no discharge.

It is claimed, however, that whatever may be the right of the plaintiffs to recover the principal debt from the defendant, they cannot recover interest for the time during which war prevented all communication between the States in which they respectively resided.

We cannot think so. Interest is the lawful fruit of principal. There are, indeed, some authorities to the point that the interest which accrued during war between independent nations cannot be afterwards recovered, though the debt, with other interest, may be. But this rule, in our judgment, is applicable only to such wars. Nor do we perceive any thing in the act of July 13, 1861, which suspended for a time all intercourse between the loyal and insurgent portions of the country, that warrants its application to the case

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before us.* Legal rights could neither be originated nor defeated by the action of the central authorities of the late rebellion.

The plaintiff must have judgment for the principal and interest of his debt without deduction.

UNITED STATES v. WALSH.

District Court; District of Oregon, July T., 1867.

ARREST.—STATE LAWS ON IMPRISONMENT.

A statute providing in general terms that an order of arrest may be issued whenever certain facts appear by *affidavit* is satisfied if the requisite facts appear by a fully verified complaint, and this complaint is laid before the court on applying for the order of arrest.

The extent to which State laws abolishing or restricting imprisonment for debt, are adopted for the guidance of the United States courts, explained.

It seems, that a State law forbidding "imprisonment for *debt*, except in cases of fraud," should be construed as meaning to prohibit imprisonment for *debt arising upon contract*, except in cases of fraud; and should not be deemed to extend to imprisonment upon a judgment for a statute penalty.

The obligation of one who has manufactured or sold goods in violation of a revenue law requiring him to pay a duty thereon, to pay a penalty imposed by the law for such violation, is a case of fraud, and within the exception in a State law prohibiting imprisonment for debt, except in cases of *fraud*. This penalty is incurred by acts which constitute a fraud upon the United States.

Motion to vacate an order of arrest.

* In the case of *Bigler v. Waller*, decided at the May term, 1870, of the circuit court of the United States for the district of Virginia, the CHIEF JUSTICE held that, under the special circumstances of that case, interest was suspended during the civil war; and intimated a doubt as to the correctness of the above ruling.

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This was an action brought in the name of the government to recover from the defendant the penalties imposed by the internal revenue laws for the manufacture and sale of matches without affixing the proper stamps.

DEADY, J. — This action was commenced by filing a complaint, May 23, 1867; and on the same day an order for the arrest of defendant was allowed at chambers. On May 27, 1867, the defendant was arrested, and gave bail in the sum of eight hundred dollars. On July 10 following, defendant's counsel filed a motion to vacate the order allowing the arrest. This motion was made and argued as the cause was called for trial; and the trial proceeded while the decision of the motion was reserved for further consideration. On the trial a verdict was given for the plaintiffs for eight hundred dollars.

The grounds urged in support of the motion are:

1. That the order was improperly made.
2. That the affidavit was insufficient.
3. That there is no undertaking for the writ.

The complaint is verified by the oath of the informer, S. P. Reed; and charges that defendant, on April 22, 1867, did manufacture and sell eight packages of friction matches, without stamping the same, or either of them, as required by the statutes of the United States; and also that on May 1, 1867, he did in like manner manufacture and sell eight other packages of friction matches. At the time of allowing the order of arrest, there was also filed the separate affidavit of the informer, containing substantially the same facts as the complaint, except that the articles therein alleged to have been manufactured and sold were described simply as "matches," without being designated as either "lucifer" or "friction" matches.

Section 9 of the Internal Revenue Act of July 13,

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1866, requires that "lucifer" or "friction" matches shall be stamped as prescribed in schedule C, and imposes a penalty of fifty dollars for every omission to affix such stamp.

Counsel for defendant maintains that this affidavit is insufficient to authorize the order of arrest, because it does not specifically allege that the matches manufactured and sold by the defendant without stamps were either "lucifer" or "friction" matches. The only kind of matches subject to stamp duty under the Internal Revenue Act, are by that act designated or called "lucifer" or "friction" matches. Whether there are any other kinds of matches known to the arts or commerce which are not subject to such duty, is a question of fact, of which I cannot take cognizance.

Ought I, in the absence of proof, *pro* or *con*, to presume that there are other kinds of matches, not subject to duty, and that, therefore, the act stated in the affidavit may or may not be a cause of arrest? I think not; but admitting, for the purpose of argument, that the affidavit is insufficient for want of certainty in this particular, the defect cannot affect this motion.

Where the cause of action and the ground of arrest are identical, and are sufficiently set forth in the complaint, there is no necessity for an additional or separate affidavit, to authorize an order for an arrest. In this case the cause of action and arrest are identical, and the statement of the facts in the complaint is sufficient for either purpose. The order allowing the arrest of the defendant may be made when it appears by affidavit that a sufficient cause of action and arrest exists. *Gen. Laws*, 165. Upon the same principle an execution is allowed against the body, without affidavit or other proof than the record, when it appears from the record that the cause of action on account of which the judgment was given was also a cause of arrest. *Gen. Laws*, 210. The statute only requires that

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the facts necessary to authorize the order of arrest shall appear by *affidavit*. If the complaint shows a cause of action and no more,—as, that the defendant is indebted to the plaintiff for money loaned,—then it would be necessary to show by affidavit, in addition to the complaint, that a cause of arrest also exists,—as, that the defendant obtained the loan by fraud.

The statute should not be so construed as to require the plaintiff to do a useless act to obtain the order. A verified complaint is in this respect an affidavit. It is a statement of facts, verified by the oath of the party making it. If it appears from such a complaint that there exists against the defendant both a cause of action and arrest, enough is shown to justify the order of arrest.

The objection that no undertaking was given for the writ to indemnify the defendant, will be next considered. The subject of arrest and imprisonment in civil actions in the courts of the United States is regulated by the acts of Congress of February 28, 1839, and January 14, 1841, the latter being declaratory of the former. The first of these acts substantially provides that no person shall be imprisoned for debt on process issuing out of the courts of the United States in any State where by the laws of such State imprisonment for debt has been abolished, and that where imprisonment for debt was allowed upon conditions and restrictions, it should be allowed in like manner in the United States courts. This act was not prospective, and therefore did not adopt the future legislation of the States. It was also held not to apply to actions in which the United States were plaintiff. On this latter account, the act of January 14, 1841, was passed, which declared that the act of February 28, 1839, should be construed to abolish imprisonment for debt in the United States courts in all cases where by the laws of the State im-

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prisonment for debt has been or *shall hereafter be abolished.*

The act is prospective in its terms, so far as future laws of the States abolishing imprisonment for debt are concerned. Whether Congress has the power to adopt prospectively State legislation on any given subject, I do not propose to discuss. The power has been seriously questioned, and apparently upon good grounds. 2 *Curt. C. Ct.* and the authorities there cited. But the act of 1841 is silent concerning the future laws of the States imposing restrictions and conditions upon the allowance of imprisonment for debt. It does not purport to adopt them. The law of this State (Oregon) regulating arrest in civil actions, requires as a condition precedent to an arrest, that the plaintiff shall give an undertaking to pay the defendant "all costs that may be adjudged to him, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking." *Gen. Laws*, 1865-6. This is a condition or restriction imposed upon the allowance of an order of arrest, and is not adopted by act of Congress. The adoption of this law by a rule of court might make it of force *as* a rule of court between private suitors, and even this is questionable. But the United States as plaintiff in an action could not be bound by such law, unless enacted or adopted by Congress. This court could not by rule require the United States to give security for costs or damages. The United States never pays costs to the adverse party, and it would not be bound by any undertaking entered into on its behalf to pay any one unless authorized by act of Congress.

The objection that the order was improperly allowed, raises the question whether the United States is entitled to arrest a defendant in an action for a penalty in this State. The constitution of this State (*Bill*

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of *Rights*, clause 19), enacts: "There shall be no imprisonment for debt except in case of fraud or absconding debtors." *Gen. Laws*, 99.

The law of this State provides, among other causes, that the defendant may be arrested on a civil "action for a fine or penalty." *Gen. Laws*, 164.

Counsel for defendant maintains that this act of the legislative assembly is in this particular repugnant to the constitution of the State, and therefore void. No decision of the supreme court is cited in support of this position, and none is known to have been made.

The word *debt* is of very general use, and has many shades of meaning. Looking to the origin and progress of the change in public opinion, which finally led to the abolition of imprisonment for debt, it is reasonable to presume that this provision in the State constitution was intended to prevent the useless and often cruel imprisonment of persons who, having honestly become indebted to others, are unable to pay as they undertook and promised. In this view of the matter, the clause in question should be construed as if it read: "There shall be no imprisonment for debt *arising upon contract express or implied*, except," etc. Such is substantially the language employed in the legislative acts of most of the States abolishing imprisonment for debt; and there can be but little doubt that this was the end which the framers of the constitution had in view, as well as the popular understanding of the clause, when the instrument was adopted at the polls.

General or abstract declarations in bills of rights are necessarily brief and comprehensive in their terms. When applied to the details of the varied affairs of life, they must be construed with reference to the causes which produced them, and the end sought to be obtained. A person who willfully injures another in person, property, or character, is liable therefor in damages. In some sense he may be called the debtor of the

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party injured, and the sum due for the injury a debt ; but he is in fact a wrong-doer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment because he is pecuniarily unable to pay what he has promised. For instance, a person who wrongfully beats his neighbor, kills his ox, or girdles his fruit trees, ought not to be considered in the same category as an unfortunate debtor. He ought to be liable to arrest in an action for damages by the party injured. To deny the latter this remedy would amount, in the majority of such cases, to a denial of justice, and a deliberate repudiation and disregard of the injunction contained in clause 10 of the Bill of Rights : " Every man shall have remedy by due course of law for injury done him in person, property, or reputation."

It may be admitted that a penalty given by statute is technically a debt ; it does not, however, arise upon contract, but by operation of law ; it is imposed as a *quasi* punishment for the violation of law or the neglect or refusal to perform some duty to the public or individuals, enjoined by law. Penalties are imposed in furtherance of some public policy, and as a means of securing obedience to law. Persons who incur them are either in morals or law wrong-doers, and not simply unfortunate debtors unable to perform their pecuniary obligations. I do not think the constitutional provision prohibiting imprisonment for debt was intended to apply to or include such cases. From these premises it follows, of course, that the act of the assembly allowing the arrest of the defendant in an action for a penalty, is not in conflict with the constitution, and, therefore, valid and binding.

But admitting, for the sake of the argument, that these penalties are a " debt " within the meaning of the clause prohibiting imprisonment for debt, do they not come within the exception " except in case of fraud " ?

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The Internal Revenue Act required the defendant to affix a certain amount of stamps upon all the matches manufactured by him, before selling the same, or removing them for consumption or sale. As a means of enforcing or securing the payment of this tax, the act also imposed a penalty of fifty dollars upon the defendant for every omission to affix such a stamp. The payment of this tax was a duty imposed upon the defendant by law. When he sold these sixteen packages of matches without affixing the stamps to them, he acted fraudulently. He thereby cheated and defrauded the United States, the plaintiffs in this action. The penalty was incurred by a fraudulent act; and even if it can be considered a "debt" within the meaning of clause 19 of the Bill of Rights, it is such a debt as falls exactly within the exception; being to all intents and purposes a case of fraud, both in morals and law.

Of course, in this respect, there can be no distinction between cheating or defrauding the government of the United States and an individual.

The order for the arrest was properly allowed, and the motion of defendant must be denied.

Motion denied.

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UNITED STATES v. FAIRCHILDS.

District Court; Western District of Michigan, October T., 1867.

CONSTITUTIONALITY OF BOUNTY AND PENSION LAWS.
—CLAIM AGENT'S COMMISSION.

Under the constitutional authority "to raise and support armies" (*Const.*, Art. I. § 8), Congress has power to bestow bounties and pensions upon those who may engage in the military service of the United States. This power embraces and authorizes an enactment making it an offense punishable in the national courts, to detain from a military pensioner any portion of a sum collected in his behalf, as his pension.

Sections 12 and 13 of the pension act of July 4, 1864, 13 *Stat. at L.* 389, limiting the fees of agents and attorneys for making out and causing to be executed the papers necessary under the act, and providing that the receiving of any greater compensation than that prescribed shall be punishable as a misdemeanor, are, therefore, constitutional.

Demurrer to an indictment.

The defendant, James H. Fairchilds, was indicted for having wrongfully withheld from one Penrose, a pensioner of the United States, a portion of a sum which the defendant, acting as agent for Penrose, had collected from the pension office, as being a pension to which Penrose was entitled.

The indictment was founded upon sections 12 and 13 of the pension act of July 4, 1864; the substance of which is as follows: That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for services under the act than that prescribed, or who shall contract or agree to prosecute any claim for a pension, bounty, or other allowance

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under the act for a percentage on the amount of the claim, or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due, shall be deemed guilty of a high misdemeanor, punishable by fine or imprisonment.

The sum withheld was claimed and retained by defendant as his commission for services rendered by him to the pensioner. The defendant demurred to the indictment upon the ground that the facts alleged did not amount to any offense.

A. D. Griswold, District-Attorney, and *E. S. Eggleston*, for the United States.

Lucius Patterson, for the defendant.

WITHEY, J.—It is argued that Congress has no power, under the Constitution, to define as an offense that which is charged against Fairchild. The question is, therefore, one of the constitutional power of Congress. Sections 12 and 13 of the act of July 4, 1864, are claimed to be unconstitutional.

It is argued by the learned counsel for Fairchild that Fairchild was the agent of Penrose and not of the government, and the District-Attorney does not deny the proposition. From this it is claimed that the transaction was purely between private citizens of a State, affected them only, and in nowise the United States government, nor any officer or agent of the United States; that these citizens were at liberty to make such bargain as they pleased in reference to the amount of compensation for services rendered by one for the other, whether that service related to pension money or otherwise; and that no law passed by Congress can, in any regard, control or affect the parties or their rights or dealings under such contract. That when once the

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pension office paid the money over to Fairchild, as the agent of Penrose, it was the property of Penrose, and he alone can call his agent to account for the same; and if any restriction can be placed upon the question of compensation of the agent, or any penalty be imposed on the agent for retaining or wrongfully withholding the whole or any portion of such moneys, only State laws can impose such restrictions and penalty. That there can be no offense by a citizen which both sovereignties can punish; if the one has the power, the other has not. That the State may exercise the power, and, therefore, the national government cannot.

It must be conceded that the line between the State and the national jurisdiction is not always clearly defined, and great care is demanded of the courts in passing upon a question like that involved in this case. The Congress of the United States has, by the passage of the act in question, declared that the power exists under the Constitution of the United States to protect the fund for the claimant, and limit the compensation which an agent or attorney shall receive for services rendered to one entitled to a pension in procuring the same. To warrant the courts in setting aside this law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist. *Fletcher v. Peck*, 6 *Cranch*, 128. And especially is this so when the question is to be decided by a court of limited or inferior jurisdiction.

The constitutionality of the act of Congress is, however, made a question, and there is no reason why this court should not consider and pass upon it. In construing the extent of the powers conferred by the Constitution upon Congress, we are to look at the language of the instrument which confers those powers in connection with the purposes for which they were conferred. What, then, are the constitutional provisions under which it is claimed Congress could pass the act

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defining the offense charged in this case? The words of the Constitution are: "Congress shall have power to raise and support armies," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States." Art. I. § 8.

The supreme court of the United States, in *McCulloch v. State of Maryland*, 4 *Wheat.* 316, hold that "although among the enumerated powers of government we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies;" and that "a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution." That the Constitution of the United States "does not profess to enumerate the means by which the powers it confers may be executed;" that "the government which has a right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

By the aid of the profound views thus expressed by Chief Justice MARSHALL, let us examine the question before us. Congress is expressly empowered to "raise and support armies," and we shall do well to remember that Congress is to be allowed, according to the ruling I have read, to select the means by which armies are to be raised and supported. In selecting the means to accomplish these things, we find pay, bounties, and pensions are stipulated and promised to the soldier. Through these means, thousands who could not otherwise afford to leave all and enter the military service, come forward, enlist, and do battle to protect and defend

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the rights, interests, and honor of the nation. By the use of these means the government is enabled readily to raise an army and fill its ranks from time to time.

Pensions and bounties are not given for the support of the army, but promised by way of inducement and reward for the citizen becoming a soldier and faithfully serving his country. There is no express power given in the constitution to Congress to give pensions or bounties to the soldier. The right is claimed, however, and has never been doubted as being within those incidental or implied powers flowing from the expressly granted or enumerated power, to "raise and support armies." They are among the means which it selects in the exercise of a granted power, and I apprehend Congress is the sole judge as to what means are appropriate and to be selected in the exercise of any of its enumerated powers. Most of the penal laws of the government of the United States rest upon the incidental or implied powers of Congress to punish violation of its laws. It was well argued by the district-attorney, that under the power to regulate commerce, Congress has passed laws regulating vessels engaged in carrying passengers, in prescribing the size of state-rooms and otherwise, as well as in requiring vessels to convey disabled American seamen found in a foreign port to this country. And, again, laws forbidding the sale of bounty certificates, as well as many other statutes of a like character, none of which have been held unconstitutional, or judicially questioned, so far as I know; and yet these statutes find no sanction in the Constitution of the United States other than in the implied powers, and the general provision "to make all laws which shall be necessary and proper for carrying into execution" the powers vested in the government.

If, then, Congress may promise bounties and pensions to the nation's soldiers, may it not, by appropriate penalties, guard those rewards against him who

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would divert them in any manner away from the beneficiary? If the soldier may lawfully be promised bounties and pensions, and if, from his occupation of arms and want of the requisite knowledge, he must employ another to prepare the requisite evidence to the pension office to bring him within the law and secure the promised bounty and pension, may not the government say to such employee: This money we pay to you for one of our soldiers, and you must pay it over to him intact; failing in which you make yourself liable to fine and imprisonment? True, the employee is the agent of the soldier in all that he does for him, but he must deal with the government in the exercise of that agency; and in taking such employment to secure for the discharged soldier his bounty or pension, he knows the restrictions placed by Congress upon the compensation he can receive, and the prohibition against his retaining any portion of the funds from the soldier. These provisions may be regarded as the terms and conditions upon which the government consents to recognize the agency of the person employed by the soldier, and pays the money over to such agent. Congress must alone be the sole judge of what is both necessary and expedient on any subject within the range of its powers to act.

“To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end.” Congress has employed a means in raising and supporting armies, in addition to pay, clothing, &c.,—bounties and pensions; and has sought by appropriate penalties to guard these moneys through all channels from the nation’s treasury into the hands of the pensioner.

Said the supreme court, in the case already referred to: “Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end,

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which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.”

I have endeavored to show not only that the end which the statute under consideration seeks is legitimate and within the scope of the Constitution, but that the means employed by Congress are appropriate and adapted to the end of raising and supporting armies, and therefore within the powers of Congress under the Constitution. Without entering upon a discussion whether the State may, in view of the legislation of Congress, impose a penalty upon the citizen for withholding the money in question, and alone regulate and control contracts between citizens of the State in reference to compensation for such services as those by Fairchilds for Penrose, it will be recollected that a law of Congress, if constitutional, prohibits and supersedes all State legislation on the same subject (1 *Park. Cr.* 67); that while the State law might control in reference to these questions, in the absence of any exercise by Congress of its constitutional powers on the subject, yet so far as Congress does constitutionally act, the State laws are so far superseded, and the citizen cannot be punished by both sovereignties for the same offense.

Sections 12 and 13 of the act of Congress are held to be constitutional. The demurrer is overruled, with leave to the defendant to plead to the indictment.

Demurrer overruled.

Haight v. Pittsburgh, Fort Wayne, & Chicago R. R. Co.

HAIGHT v. PITTSBURGH, FORT WAYNE, &
CHICAGO RAILROAD COMPANY.

District Court; Western District of Pennsylvania,
1867.

INCOME TAX.—CORPORATE BONDS.

A stipulation in a mortgage by a corporation, requiring payment "without any deduction, &c., for or in respect of any taxes, charges, or assessments whatsoever," does not prevent the corporation from paying the income tax chargeable against the holder of the mortgage in respect to the interest accruing to him from time to time upon the mortgage, and deducting the amount paid from such interest.

Trial by the court.

This action was brought to recover arrears of interest upon bonds given by the defendants to the plaintiff, secured by a mortgage upon land. The defendants claimed to deduct from the interest due by the tenor of the bond, the amount of the income tax imposed by the internal revenue law upon the plaintiff, in respect of such interest, and which had been paid in behalf of plaintiff by defendants.

E. Knox, for the plaintiff.

E. Lawrie, for the defendants.

McCANDLESS, J.—On April 10, 1857, Samuel Haight and wife conveyed to the Pittsburgh, Fort Wayne, & Chicago Railroad Company a lot of ground in the city of Pittsburgh, for the sum of one hundred and five

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thousand dollars. Five thousand dollars were paid in hand ; and for the residue of the purchase money Mr. Haight received one hundred bonds of one thousand dollars each, with coupons attached, bearing seven per cent. interest, payable semi-annually. These bonds are secured by a mortgage on the premises, containing, in the clause of defeasance, the usual stipulation, "without any fraud or further delay, and without any deduction, defalcation, or abatement to be made of anything for or in respect of any taxes, charges, or assessments whatsoever."

By the internal revenue law the interest on these bonds is subject to a tax of five per cent. The bonds have nearly twenty years yet to run, and the mortgage upon the above-recited clause of which it is claimed the defendants have incurred the liability to pay this tax, could not be sued for foreclosure until a year and a day after the maturity of the bonds. As the mortgage is a mere security for the payment of the bonds, their satisfaction would be its discharge.

We must, then, recur to the coupons, upon which, properly, this suit is instituted. What are they but income, the annual profit on money safely invested ? There is no special contract to pay government taxes upon the interest. The measure of the defendants' liability is expressed in the bonds as being debt and interest only. They have nothing to do with the taxes which the government may impose upon the plaintiff for the interest payable to him.

The clause in the mortgage cannot enlarge the duty which the mortgage was given to secure,—that is, the payment of the debt and interest. It is to be found in all mortgages, and if the doctrine contended for by the plaintiff be sound, the standard by which the imposition of taxes should be regulated would be in proportion to a man's poverty and not his wealth ; for the

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mortgagor would be bound to pay not only his own taxes, but those of the mortgagee.

It was admitted, at the argument, that the plaintiff, a citizen of New York, paid no internal revenue tax on these bonds at the place of his residence. The facts, therefore, do not present a case of double taxation. The tax should be paid somewhere, and it was to meet investments like this in banks, railroads, insurance and other companies that section 122 of the act of 1864 was passed. Congress enjoined it as a duty upon all such corporations to deduct and withhold from all payments on account of any interest or coupons due and payable, the tax of five per cent. ; and provided that the payment of the same shall discharge the companies from that amount of interest or coupon, unless where the companies have contracted otherwise ; and it was properly so provided, for citizens of the United States, resident both at home and abroad, sometimes forget the institutions in which their capital has been invested.

The opinion of the court is with the defendants ; and instead of two thousand and ten dollars, judgment is ordered for the plaintiff for five hundred and forty dollars, admitted to be due, with interest from July 1, 1867.

Judgment accordingly.

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MATTER OF ELIZABETH TURNER.

*Circuit Court, Fourth Circuit ; District of Maryland,
October T., 1867.*

ABOLITION OF SLAVERY.—ILLEGAL APPRENTICESHIP.

An indenture purporting to bind a child of negro descent apprentice, which does not contain important provisions for the security and benefit of the apprentice, which are required by the general laws of the State in indentures of white apprentices, is void ; under section 1 of the civil rights bill of 1866.

The civil rights bill of 1866 is constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment.

Colored persons, equally with white persons, are citizens of the United States. *So held*, of one who was formerly held as a slave, and was emancipated in the general abolition of slavery throughout the State, accomplished by a new State constitution.

Hearing upon a writ of *habeas corpus*.

The petition in this case was preferred in behalf of Elizabeth Turner, by her next friend, Charles Henry Minoky. It alleged that Elizabeth Turner was the daughter of Elizabeth Minoky, formerly Elizabeth Turner ; and that she was restrained of her liberty, and held in custody by Philemon T. Hambleton, of Saint Michael's, Talbot county, Maryland, in violation of the constitution and laws of the United States. The petition further showed that this restraint was claimed and exercised by virtue of certain alleged indentures of apprenticeship ; but alleged that these indentures were not made in accordance with the laws of the State of Maryland, as applicable to the binding of white children ; and, in particular, that at the time of making the

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alleged indentures of apprenticeship the mother of the petitioner was able, ready, and willing to support her ; that the petitioner was not summoned to appear before the orphans' court of Talbot county on the day of making the said alleged indentures of apprenticeship ; and that Hambleton, as master, was not bound by the alleged indentures of apprenticeship to give the petitioner any education in reading, writing, and arithmetic ; all of which requirements are made necessary by the laws of the State of Maryland in the case of the binding of white children.

The respondent, Hambleton, made the following return to the writ :

"In obedience to the command of the within writ, I herewith produce the body of Elizabeth Turner, together with a copy of the indenture of apprenticeship, showing the cause of her capture and detention, and respectfully await the action of your honor."

The indentures of apprenticeship filed by the respondent, provided that Elizabeth Turner shall be taught the art or calling of a house servant ; and that the master shall provide said apprentice with food, clothing, lodging, and other necessities, and shall pay to Betsey Turner, her mother, ten dollars at the end of her sixteenth year, twelve dollars and fifty cents at another period, and fifteen dollars to the girl at the end of her term of service, on the 18th of October, 1874, she having been born October 18, 1856. They recited that the child was apprenticed "by the consent of her mother, present in court," on November 3, 1864. They provided that in the event of the death of her mother the wages should be paid to the child.

It further appeared, on the argument, that the child and her mother were formerly held as his slaves by the respondent. They were emancipated by the new constitution of the State, which took effect November 1, 1864. The child was bound apprentice to the respon-

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dent, November 3, 1864, two days after she became free ; and the indentures were made in pursuance of a general law of the State regulating the apprenticing of children previously held as slaves, and differing in many provisions from the law governing the apprenticing of white children.

Mr. Stockbridge, for the petitioner.

The respondent appeared on the hearing, in person, and stated that he desired simply to submit the case to the judgment of the court.

The chief justice said that the questions in the case were so grave and important that he should prefer to be advised by the argument of counsel on the part of the claimant. He would adjourn the court until next day at nine o'clock, in order to give the claimant or any person interested in the decision of the case an opportunity to appear. If no person appeared he would then dispose of the case.

The child was retained in the custody of the court until the next day, when the following opinion was filed :

CHASE, Ch. J.—The petitioner in this case seeks relief from restraint and detention by Philemon T. Hambleton, of Talbot county, in Maryland, in alleged contravention of the constitution and laws of the United States. The facts, as they appear from the return made by Mr. Hambleton to the writ, and by his verbal statement made in court, and admitted as part of the return, are substantially as follows :

The petitioner, Elizabeth Turner, a young person of color, and her mother, were, prior to the adoption of the Maryland Constitution of 1864, slaves of the respondent. That constitution went into operation on

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November 1, 1864, and prohibited slavery. Almost immediately thereafter many of the freed people of Talbot county were collected together under some local authority, the nature of which does not clearly appear, and the younger persons were bound as apprentices, usually, if not always, to their late masters. Among others, Elizabeth, the petitioner, was indentured to Hambleton by an indenture dated November 3, two days after the new constitution went into operation.

Upon comparing the terms of this indenture (which is claimed to have been executed under the laws of Maryland relating to negro apprentices) with those required by the law of Maryland in the indentures for the apprenticeship of white persons, the variance is manifest. The petitioner, under this indenture, is not entitled to any education ; a white apprentice must be taught reading, writing, and arithmetic. The petitioner is liable to be assigned and transferred at the will of the master to any person in the same county ; the white apprentice is not so liable. The authority of the master over the petitioner is described in the law as a "property and interest ;" no such description is applied to authority over a white apprentice. It is unnecessary to mention other particulars.

Such is the case. I regret that I have been obliged to consider it without the benefit of any argument in support of the claim of the respondent to the writ. But I have considered it with care, and an earnest desire to reach right conclusions.

For the present, I shall restrict myself to a brief statement of these conclusions, without going into the grounds of them. The time does not allow more.

The following propositions, then, seem to me to be sound law, and they decide the case :

1. The first clause of the thirteenth amendment to the Constitution of the United States interdicts slavery

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and involuntary servitude, except as a punishment for crime, and establishes freedom as the constitutional right of all persons in the United States.

2. The alleged apprenticeship in the present case is involuntary servitude, within the meaning of these words in the amendment.

3. If this were otherwise, the indenture set forth in the return does not contain important provisions for the security and benefit of the apprentice which are required by the laws of Maryland in indenture of white apprentices, and is, therefore, in contravention of that clause of the first section of the civil rights law enacted by Congress on April 9, 1866, which assures to all citizens without regard to race or color, "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

4. This law having been enacted under the second clause of the thirteenth amendment, in enforcement of the first clause of the same amendment, is constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment.

5. Colored persons equally with white persons are citizens of the United States.

The petitioner, therefore, must be discharged from restraint by the respondent.

The chief justice passed the following order :
Ordered by the Court, this 16th day of October, A. D. 1867, that Elizabeth Turner be discharged from the custody of Philemon T. Hambleton, upon the ground that the detention and restraint complained of is in violation of the constitution and laws of the United States ; and it is further ordered that the costs of this proceeding be paid by the petitioner.

POTTER v. CROWELL.

*Circuit Court, Sixth Circuit; Northern District of
Ohio, September T., 1866.*

INFRINGEMENT OF PATENT. — PRELIMINARY INJUNCTION.

Upon a bill to restrain an infringement of a patent, if it is shown that defendants have formerly been engaged in infringing, the mere fact that since the commencement of the suit they have ceased to do so, and do not threaten to renew their sales, is not an answer to an application for a preliminary injunction to restrain the continuance or renewal of such infringement.

Motion for a preliminary injunction.

Samuel S. Fisher, for the motion.

Mr. Andrews, opposed.

WITHEY, J.—Complainants are, by assignment from A. B. Wilson, owners of the right secured to the latter by reissued letters patent, numbered 346, for improvement in the feed motion of sewing machines. They allege in their bill, that defendants infringe their rights by vending for use the “New England Sewing Machine,” and apply to the court, by motion, for a temporary injunction to restrain defendants from selling the infringing machine. The defendants have answered, and affidavits are presented by both parties.

The fact is conclusively established, that the New England sewing machine does use the feed motion covered by the Wilson patent. Defendants admit that such machines were kept in their sales room in the city

of Cleveland ; and, that, as salesmen or agents for the owners, they exhibited, sold, and delivered them to customers of such owners, from time to time, prior and subsequent to the time of commencement of this suit ; but that they had no interest whatever in the machines so sold.

Sales made under such circumstances render the persons selling infringers. This is conceded on the argument by defendants' counsel ; and see *Boyd v. McAlpin*, 3 *McLean*, 427 ; *Boyce v. Dorr*, *Id.* 582 ; *Buck v. Cobb*, 9 *Law Rep.* 582.

The principal objection urged against this motion is, that there is now *no continuing injury* ; as, by their answer and proofs, defendants show, that, soon after the bill was filed and served, all the New England sewing machines in their rooms were removed by the owners, Clark & Barker, since which they have sold none ; that they do not propose or desire to again engage in such sale, and that they have abandoned the injury complained of. It is claimed that the court will not do what there is no occasion for doing ; and that, acting upon the case as it appears on the hearing of the motion, there is no occasion for the exercise of the restraining power of the court.

Let us look at the case as it is presented. The bill alleges the injury to complainants' rights as existing at the time suit was commenced, and for some time previous thereto ; that defendants asserted their intention and right to continue it, and that notice had been served upon defendants prior to suit, directing them to desist from further sales of the infringing machine. Under these circumstances, complainants found it necessary to bring suit and apply to the court for protection to their rights. The defendants meet this application by denying in their answer that the New England machine does infringe the Wilson patent, thereby asserting a right to continue the sale of such machines ;

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but say that soon after the bill was filed and served in this cause, Clark & Barker, owners of the New England sewing machine, removed all those machines from defendants' rooms; that defendants have none of them now in their possession, and disclaim any purpose or desire to again engage in selling them.

No compensation has been made or offered to complainants for the injury sustained; it is within the power of defendants to renew the injury, and under their claim of right, it is not impossible that they will change their minds hereafter, if no injunction is granted. Certainly there would be nothing to prevent, and complainants, in that event, would be obliged to renew their motion at any time before final hearing.

And certainly, if the abstract proposition, of no continuing injury at the time of hearing, is a valid objection against this motion, it is not easy to see why a like disclaimer by defendants on a second motion, and renewed abandonment of sales, would not be a second time successful.

Where the injury is not only past, but cannot, from the nature of the case, be renewed or continued, no injunction would be granted, for the well recognized principle should in such case prevail, that past injuries are not in themselves ground for injunction; and because the restraining power of a court of equity can only be invoked, not to remedy injuries already done, but to prevent injury.

Perhaps as safe a criterion of what is to be apprehended from defendants as can be obtained, is to look at that which they have done, and in their answer justify the right to do, rather than to look to the fact of their having discontinued the alleged injury, and their declaration of want of intention of renewing the same. The court is not prepared to say that no occasion for the exercise of its restraining power is shown in this case, when it is apparent that there was such occasion

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when the suit was commenced ; that it has but recently ceased ; that it may, if defendants feel disposed, be renewed at any time, and that the complainants claim that they apprehend a continuance of the wrong.

In *Woodworth v. Stone*, 3 *Story C. Ct.* 752, cited by complainants, STORY, J., says: "A bill for an injunction will lie if the patent right is admitted, or has been established, without any established breach, upon the ground of apprehended intention on the part of a defendant to violate the plaintiff's right." The opinion of the court in *Sickles v. Mitchell*, 3 *Blatchf.* 558, does not sustain the head note of the case. One of the two steamers owned by defendant, and using the plaintiff's patented invention, had been burned, but the other was still employed in navigation, and infringed upon plaintiff's rights by employing his patent ; hence there was, at the time of hearing, a continuing injury. Complainants' counsel cited this case as an authority to the point, that it is not a sufficient answer to this motion that the infringement has been discontinued, and is not intended to be resumed, no compensation for the unlawful use having been made. While the head note of that case goes thus far, the opinion of the court does not ; as will be seen from an examination of the case.

Nevertheless, upon principle, it seems to the court that the right of protection, which existed when this cause was commenced, ought not to be defeated by anything which has thus far been asserted on behalf of defendants, particularly as no injury can possibly result to defendants, while the allowance of the motion will ensure protection to complainants.

The nature and purposes of an injunction, and the general principles governing courts of equity in granting it, are, in the abstract, as stated and claimed by defendants' counsel ; but every case presented to a court for the exercise of its restraining power, must

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necessarily depend to a great extent upon the peculiar circumstances of the individual case, and the judge must so apply principles as to accomplish the ends of justice and the purposes of jurisdiction.

Injunction granted.

UNITED STATES v. FIFTY-SIX BARRELS OF
WHISKEY.

District Court ; District of Kentucky, July T., 1866.

INTERNAL REVENUE LAW.—FORFEITURES.

A *bona fide* purchaser of personal property, which has been forfeited to the government by previous acts of the former owner, is not protected against the title of the government. The right of the government founded on the forfeiture must prevail over any title acquired by purchase subsequent to the forfeiture.

The general rule in respect to the *time* when a forfeiture takes effect, is, that when a statute denounces a forfeiture of property as the punishment of a violation of law, if the denunciation is expressed in direct terms and not in the alternative, the forfeiture takes place at the time when the offense is committed, and operates at that time as a statutory transfer of the right of property to the government.

No distinction exists, in this respect, between the operation of a statute which declares that, for a specified offense, *the property designated shall be forfeited*, and one which declares that *the offender shall forfeit* the property.

Where one who has purchased property,—such as spirits,—which had been previously forfeited to the government, has mixed it (although in good faith) with other property free from forfeiture, so that it can no longer be identified, the courts, in enforcing the forfeiture, can not make any division of the aggregate between the claimant and

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the government. All the forfeited property must be delivered to the government; and if this, by reason of the admixture, necessitates the delivery of the other, the claimant must bear the loss.

Trial of an information.

This was an information filed against fifty-six barrels of whiskey, and certain stills and other vessels, for a violation of section 68 of the Internal Revenue Act of 1864.

The information contained two counts.

The first count alleged, in substance, that one William E. Reed was the owner of the stills and other vessels in question, and used the same in the distillation of spirits continuously from September, 1865, until the seizure, and that he had used said stills and vessels in the distillation of the fifty-six barrels of whiskey seized; but he did not, from day to day, make, or cause to be made, in a book kept for that purpose, a true and exact entry of the number of gallons so distilled, or of the number sold or removed for consumption or sale.

The second count alleged that Reed did not render to the assessor, or to the assistant assessor, on the 1st, 11th, and 21st days of each and every month, or within five days thereafter, or on the first day of each month, an account in duplicate, taken from his books, of the number of gallons of spirits distilled, or the number sold or removed for consumption or sale.

Twenty-two of the barrels seized were claimed by William H. Walker & Co., three were claimed by Gheens & Co., and the remaining thirty-one, together with the stills and other vessels, not having been claimed by any one, were condemned by default.

The claimants filed separate answers, but the defense of each was substantially the same. Both denied every substantial allegation contained in the information, and both alleged that they purchased the whis-

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key claimed by them respectively before the seizure, *bona fide*, and that they paid for the same a full and fair consideration, without any knowledge or suspicion of the alleged forfeiture, or cause of forfeiture. They also both alleged, substantially, that the whiskey was, at the time of the purchase, regularly and legally branded by plaintiffs' inspector.

The case was, by agreement of parties, submitted to the court upon the law and facts, a jury being waived.

B. H. Bristow, District-Attorney, for the government.

John W. Barr, and *Martin Bijur*, for the claimants.

BALLARD, J.—I shall neither state nor discuss the facts proven. My conclusion in respect to these is, that every substantial allegation of the information is true, and that no part of the matter set up in the answers, in support of the claims, is sustained by the evidence, except: 1. That the barrels of whiskey purchased by the claimants had been regularly branded by the United States inspector prior to the purchase. 2. That the claimants are *bona fide* purchasers, without any notice of, or cause to suspect, the alleged forfeiture.

These facts present the following questions for my decision, to wit: *First*. Does the information set forth a good cause of forfeiture? *Second*. Have the claimants supported their claims?—that is, do the facts alleged and proven by them constitute any reason why the forfeiture should not be enforced?

Sections 57 and 68 of the Internal Revenue Act furnish a complete answer to the first question.

Section 57 makes it the duty of "every person who shall be the owner of any still, boiler, or other vessel

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used . . . for the purpose of distilling spirituous liquors . . . and of every person who shall use any still, boiler, or other vessel as aforesaid, either as owner, agent, or otherwise, from day to day, to make a true and exact entry, or cause to be entered in a book kept for that purpose, the number of gallons of spirits distilled . . . and also the number sold or removed for consumption or sale."

The first count, we have seen, alleges a neglect of the duty here enjoined.

This section also provides, that every such person, if he distill one hundred and fifty barrels of spirits per year, or more, shall render the assessor, or assistant assessor, on the 1st, 11th, and 21st days of each and every month in each year, or within five days thereafter, an account in duplicate, taken from his books, of the number of gallons of spirits distilled, and also the number of gallons sold or removed for consumption or sale, and that he shall pay the taxes on such spirits at the time of rendering the duplicate account thereof. If he distill less than one hundred and fifty barrels per year, he may make his returns and pay duties on the first day of every month.

The second count of the information avers a neglect of this duty.

Section 68 provides "That the owner, agent, or superintendent of any . . . still, boiler, or other vessels used in the distillation of spirits, on which a duty is payable, who shall neglect or refuse to make true and exact entry of the same, or to do, or cause to be done, any of the things by law required to be done as aforesaid, shall forfeit, for every such neglect or refusal, all the . . . spirits made by or for him . . . and the stills, boilers, and other vessels used in distillation, together with the sum of five hundred dollars . . . which said spirits, with the vessels containing the same, with all the vessels used in mak-

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ing the same, may be seized by any collector or deputy collector of internal duties, and held by him until a decision shall be had thereon, according to law. . . . And the proceeding to enforce said forfeiture of said property shall be in the nature of a proceeding *in rem*."

It is manifest that the information does, in apt form and in apt language, set forth neglects of duty for which a forfeiture is denounced by the express terms of this section. This is conceded by the learned counsel of the claimants. They admit that the property seized must be condemned as forfeited if the facts established by the claimants are not sufficient to show that, as to the property claimed by them, there never was any forfeiture.

In respect to the first fact established by the claimants, that is, that the barrels were regularly branded by the United States inspector before they purchased, it is clear that it furnishes no answer to any thing alleged in the information. Besides the duties which are enjoined by section 57, the neglect of which is alleged in the information, section 59 requires, "That all spirits distilled as aforesaid by any person licensed as aforesaid shall, before the same are used or removed for any purpose, be inspected, gauged, and proved by some inspector appointed for the performance of such duties." If the information had alleged a removal of the spirits distilled before inspection, the fact that the barrels were branded before removal would have been material. It, however, not only furnishes no answer to the charges set out in the information, that no entry was made from day to day, in a book kept for that purpose, of the number of gallons of spirits distilled, or the number removed for consumption or sale, and that no return was made to the assessor, such as is required by law, but it has not the slightest relation to either of them. This is conceded by the claimants.

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They do not rely on this fact as precluding a condemnation. They treat it simply as one of the facts which show that the claimants acted in good faith and are *bona fide* purchasers; and, as I have already announced that I am satisfied, upon the whole case, that the claimants are such purchasers, it is wholly immaterial for me to state what influence I have given to this single fact in arriving at the more general conclusion of the good faith of the claimants. If the barrels had not been branded by an inspector this would have been a most material fact, if an effort had been made to show bad faith; but no such effort has been made. That the claimants were innocent purchasers is established, and is not, in fact, contested by the United States, and, therefore, the fact of the barrels being branded is entitled to no consideration whatever.

This brings me to the consideration of the main question in the case: Does the fact that the claimants purchased the whiskey claimed by them *bona fide*, and without any knowledge or suspicion of the alleged cause of forfeiture, preclude a judgment of condemnation? This is a very important question, whether it be considered in reference to the citizen or to the government. It has been argued before me with great ability, and I have bestowed upon it much reflection.

The general law of property is, that the true owner may recover it of any one who has it in possession, no matter whether the possessor be a *bona fide* purchaser or not. The law which protects *bona fide* holders of bills of exchange and other negotiable paper has no relation to property generally. Every purchaser of merchandise or other property risks, in a certain sense, the title of his vendor, and, if it turns out that his vendor has no title and the property be recovered of him, he has no remedy except on the warranty of the vendor. It follows that, if when Walker & Co. and Gheens & Co. purchased the whiskey claimed by them their ven-

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dor had no title—that is, if it had already been forfeited to the United States, the fact that they are *bona fide* purchasers cannot avail them. Their good faith cannot oust the claim of the true owner. They are exactly in the condition of every *bona fide* purchaser of property whose title fails and who is therefore obliged to surrender it to the owner. They must look to the warranty of their vendor.

Indeed, I have difficulty in perceiving that the *bona fides* of the purchase is at all material, or that it has any relation to the grounds of forfeiture alleged in the information. If the forfeiture took place prior to their purchase, it is undisputed and indisputable that the right of property was immediately transferred to the United States, and that the right of the latter must prevail over that of the purchaser, notwithstanding the purchase was made in good faith.

The right of the United States in such case depends not at all on the conduct of the purchaser, but upon their own superior title, resulting from a forfeiture which took place prior to any inception of right in the purchaser.

If there was no forfeiture prior to the acquisition of right by the claimants, whether the right was acquired by purchase for a valuable consideration or by gift, I am at a loss to conceive how there was any forfeiture at all. I cannot see how property, whether acquired by gift or purchase, can be condemned as forfeited for the offense of its former owner, which was not already forfeited at the time of the gift or purchase. If the acquisition be by pretended gift or pretended purchase, in such sense that the title is not changed, but really remains in the first owner, then, of course, his offense committed after the pretended gift or sale may work a forfeiture. But neither the Internal Revenue Act nor any other act of Congress forfeits property for the crime of a person which does not belong to him, or is not

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managed by him at the time of the forfeiture. Property is sometimes forfeited in consequence of the act of some person who manages or controls it other than the owner ; but the forfeiture does not extend to property previously managed or controlled, and which, before being contaminated with the offense, is sold or otherwise parted with in good faith.

The question then comes to this : When does the forfeiture denounced by section 68 take place ? Does it take place at the time the offense is committed, or at some subsequent time ?

The decisions are uniform, both in England and the United States, that when a statute denounces a forfeiture of property as the penalty for the commission of crime, if the denunciation is in direct terms, and not in the alternative, the forfeiture takes place at the time the offense is committed, and operates as a statutory transfer of the right of property to the government. *Roberts v. Witherhead*, 12 *Modern Rep.* 92 ; *Salkeld*, 223 ; *Wilkins v. Despard*, 5 *Term R.* 112 ; *United States v. Nineteen hundred and sixty bags of Coffee*, 8 *Cranch*, 398 ; *The Mars*, *Id.* 417 ; *Gelston v. Hoyt*, 3 *Wheat.* 311 ; *Wood v. United States*, 16 *Pet.* 362 ; *Caldwell v. United States*, 8 *How.* 381.

The case of *United States v. Nineteen hundred and sixty bags of Coffee* arose under section 5 of the Non-Intercourse Act of March, 1809, 2 *Stat. at L.* 529, which provides, "That whenever any article . . . the importation of which is prohibited by this act, shall after May 20, be imported into the United States . . . or be put on board of any ship or vessel, boat, raft, or carriage, with intention of importing the same into the United States . . . all such articles, as well as all other articles on board of the same ship or vessel, boat, raft, or carriage belonging to the owner of such prohibited articles, shall be forfeited, and the owner shall, moreover, forfeit and pay treble the value of such articles."

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The claimants made precisely the same plea which Walker & Co. and Gheens & Co. make in this case ; that is, they alleged that they were *bona fide* purchasers for a valuable consideration. The case was most ably and elaborately argued ; but the supreme court overruled the plea, and held that by the terms of the statute, the forfeiture took place upon the commission of the offense, and the purchaser was not protected. It will be perceived that this statute does not fix the time at which the forfeiture is to take place in more explicit terms than does the statute under which the present case arises. The one declares that whenever any article shall be imported it shall be forfeited, and that the owner shall forfeit other property ; and the other declares that the owner, agent, or superintendent, &c. . . . who shall neglect to make true and exact entry and report, or to do any of the things required by law, shall forfeit, &c. If the forfeiture under the act of 1809 takes place at the time of the commission of the offense, so as to override the title of all subsequent purchasers, and this, we have seen, the supreme court have expressly decided, I can conceive of no argument which would not refer the forfeiture under the act of 1864 to the same time, or which would not invest the forfeiture with the same consequences.

The case of *Gelston v. Hoyt*, 3 *Wheat*. 311, involved a construction of the Neutrality Act of 1794, 1 *Stat. at L.* 383, the third section of which declares a forfeiture of vessels fitted out and armed to be employed in the service of a foreign State in committing hostilities against the citizens, subjects, or property of another foreign State with whom the United States are at peace. The court say "the forfeiture must be deemed to attach at the moment of the commission of the offense, and consequently from that moment the title of the plaintiff would be completely divested, so that he could maintain no action for the subsequent seizure. This is the

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doctrine of the English courts, and it has been recognized and enforced in this court upon very solemn argument."

The case of *Caldwell v. United States* involved, in part, the construction of sections 66 and 68 of the Collection Act of 1799, 1 *Stat. at L.* 677, the latter of which declares a forfeiture in the alternative, that is, of the goods or their value, and the former declares it without any alternative.

The inferior court had instructed the jury, "that if the goods were fraudulently entered, it is no matter in whose possession they were when seized, or whether the United States had made an election between the penalties, and that the forfeiture took place when the fraud, if any, was committed, and the seller of the goods could convey no title of the goods to the purchaser." The supreme court say: "This instruction is partly right and partly wrong—right in respect to section 68, as the penalty is a forfeiture of the goods without an alternative of their value; wrong, as the instruction applies to section 66, the forfeiture under it being 'either the goods or their value.'

"In the first, the forfeiture is the statutory transfer of right to the goods at the time the offense is committed. If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of his contrivance by which he has violated the law. The title of the United States to the goods forfeited is not consummated until after judicial condemnation, but the right to them relates backwards to the time the offense was committed, so as to avoid all intermediate sales of them between the commission of the offense and the condemnation.

"So this court said in the case of *United States v. Nineteen hundred and sixty bags of Coffee*, 8 *Cranch*, 398. It was said again in the case of *United States v.*

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The Mars, *Id.* 417; declared again, four years afterwards, in *Gelston v. Hoyt*, 3 *Wheat.* 311, in these words: 'The forfeiture must be deemed to attach at the moment the offense is committed, so as to avoid all sales afterwards.' "

There is, we have seen, no alternative in section 68 of the Internal Revenue Act of 1864. The forfeiture of the spirits, stills, boilers, and other vessels used in distillation, is by it directly declared. Its construction is, therefore, fixed by the decisions to which I have referred, almost as certainly and conclusively as if its provisions had been the direct subject of adjudication. The conclusion to my mind, then, is irresistible, that the forfeiture denounced by this section, to use the language of the supreme court, "takes place at the time of the commission of the offense, so as to avoid all sales afterwards."

It is just to the learned counsel of the claimants to say, that they concede this would be the correct construction of the section if it had, in so many words, declared that the spirits, &c., should be forfeited. They say that the statute does not declare that the spirits, &c., shall be forfeited, but that the owner, agent, or superintendent shall forfeit them, and that this difference of language requires a difference of construction.

Their argument is extremely refined, and is difficult to state. If I understood them, they contend that there is a difference between the construction of a statute which denounces a forfeiture of specific property as the penalty of an offense, and one which declares that the offender shall forfeit it. In the first case they concede that the forfeiture takes place at the time of the commission of the offense, whilst in the latter they insist it does not take place until seizure, conviction, or judgment. No adjudged case or other authority has been cited in support of this distinction, and I am unable to conceive any good reason for up-

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holding it. What ground is there for referring the forfeiture to the time of seizure? There must have been a previous forfeiture to authorize a seizure. The seizure is the consequence of the forfeiture, not the cause. Nor do I see any reason for referring the forfeiture to the time of conviction or judgment. The conviction and the judgment are simply the consummation of the proceeding that the law requires to be instituted to ascertain the fact or forfeiture of which the seizure is the beginning.

If the statute made the forfeiture the consequence of the personal conviction of the offender, in which case there is no seizure, or if it even required a personal trial and conviction to precede judgment of forfeiture, there might be some force in the argument of the learned counsel founded on forfeitures at common law in cases of treason and felony. I admit that, at common law, there was no forfeiture of the goods and chattels of a felon until he was convicted; but under that law, no penalty whatever could be inflicted for the crime of felony except in cases of suicide, flight, and perhaps a few other analogous cases, until after the personal conviction of the offender, and in the excepted cases the forfeiture related to the time of the offense. When the felon was convicted, death was the penalty, and judgment of death followed. A forfeiture of goods and chattels was a consequence of the conviction, and a forfeiture of real estate a consequence of the judgment; but forfeiture was no part of the judgment. Here, however, we are not trying the offender at all, or if at all, only incidentally. He is not personally before the court, and cannot in this proceeding be convicted. The statutes under which we are proceeding do not make the forfeiture the consequence of his conviction, but of his offense, which offense it authorizes to be inquired into by a seizure of, and a proceeding against, the property itself. Having ascertained that

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offenses were committed, I cannot in this proceeding render any judgment against the offender ; I can only render a judgment of condemnation of property, which judgment is merely the judicial ascertainment of the fact that the property was previously forfeited.

When a statute declares that an offender shall forfeit property as the penalty of his offense, and authorizes a proceeding *in rem* to ascertain the forfeiture, I am satisfied that the forfeiture takes place at the time of the commission of the offense just as certainly as it does when the statute directs, not that the offender shall forfeit, but that the property itself shall be forfeited. There is a difference between common law and statutory forfeitures. Common law forfeitures, except in cases of deodand, suicide, flight, and perhaps a few others, were the consequence of conviction, or of judgment against the felon, and followed his personal trial ; but statutory forfeitures are usually enforced by proceeding against the thing, and relate to the time of the commission of the offense. This distinction is recognized by the supreme court in the case of *United States v. Grundy*, 3 *Cranch*, 337, and other cases. They say, "When the forfeiture is given by statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately or on the performance of some particular act, as shall be the will of the legislature." When there is no alternative in the statute, when it directly declares a forfeiture, and no time subsequent to the committing of the crime is named at which the forfeiture is to take effect, the settled rule, we have seen, is, that it relates to the time of the commission of the offense.

Whether the statute declares a forfeiture of property as the consequence of crime, or that the person who committed the crime shall forfeit it, the effect is the same. In either case the immediate loss falls on the owner. Whether the forfeiture is in consequence of his

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own unlawful act, or of the unlawful act of some other person, respecting the thing forfeited, the loss is still his, and his only. It is he who in fact forfeits or loses, no matter in what language the forfeiture is declared. By the terms of the statute we are now considering, the agent or superintendent who uses stills, boilers, or other vessels in the distillation of spirits, and who neglects to do the things enjoined by law, forfeits as well as the owner. But the agent is not owner, and literally he cannot forfeit what he does not own. He may cause its forfeiture by his unlawful act, but he cannot lose what is not his. Therefore, when the statute declares that the agent or superintendent shall forfeit the stills, boilers, and other vessels, it must be understood to mean that these articles shall be forfeited in consequence of his neglect of duty. And if this be its meaning, even the learned counsel of the claimants would concede, that the consequence and effect of the forfeiture are that the title to the thing forfeited passes instantly upon the commission of the offense.

I observe that the learned judge of the Eastern District of Missouri treats section 68 as if it read, that the owner of the spirits shall forfeit them. And on this reasoning he seems to have founded his conclusion that the owner does not forfeit what he sells before seizure. He says: "That as 'the owner,' &c., shall forfeit, and not the purchaser, the owner can forfeit only what belongs to him." It may be conceded that the owner can forfeit only what belongs to him, but I do not see that this helps the argument; for if the forfeiture takes place, as I have shown it does, at the time the offense is committed, it is not necessary to claim that he forfeits more than what then belongs to him. If he forfeits that, the title of the United States immediately takes effect and prevails over that of all purchasers. *United States v. Three hundred and ninety-six Barrels, 3 Int. Rev. Rec. 123.*

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An attentive examination of the section, however, will show that, by its terms, it is not the owner of the spirits, but the owner, agent, or superintendent of the stills, boilers, or other vessels in the distillation of spirits, who forfeits. It is the neglect to perform a prescribed duty by any one who uses stills, boilers, or other vessels in the distillation of spirits, whether as owner, or simply as agent or superintendent, which produces the forfeiture; and what are forfeited are the stills, boilers, and other vessels and spirits made by or for him. If the agent forfeits only what "belongs to him," he forfeits nothing, for the stills, boilers, and other vessels and spirits do not belong to him. They belong to the principal. But the statute says the agent who neglects, &c., shall forfeit these things, and there are no means of escaping a provision so express. The statute, then, must mean that these things shall be forfeited for the agent's neglect, or as to him it is inoperative, and has no meaning at all. And if they are forfeited for his neglect, surely the forfeiture takes effect the moment of neglect. There is no other period to which it can possibly be referred.

I have great respect for the opinions of the learned judge who decided the case of *United States v. Three hundred and ninety-six Barrels*, above referred to. I have not ventured to differ from him until after the fullest consideration and the clearest conviction. I cannot but think his decision is based on a misreading of the statute, as well as on a misconception of adjudged cases. The conclusion to which I have arrived is, I think, sustained by a recent unreported opinion of the learned judge of the Southern District of Ohio, in the case of *United States v. Sixteen hogsheads of Tobacco*, and by the uniform decisions of the supreme court of the United States; and I have not a doubt of its correctness.

I need not say that I have arrived at my conclusion

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reluctantly. I have examined every provision of the statute ; I have attentively considered section 180, and every section which declares a forfeiture, and I think that the provisions of each and all of them confirm the construction of section 68 which is here adopted. It would be a much more pleasing task for me to order a restoration of the property seized to the innocent claimants than to adjudge its condemnation, if I could do so consistently with my sense of duty. I have been literally forced to a decision in spite of my personal inclination by a current of authorities which is irresistible.

Judgment of condemnation must be entered.

The counsel of Walker & Co., however, ask that the judgment be limited to nineteen of the barrels claimed by them, and that the other three seized in their possession be restored. This motion is based on the following state of facts :—

The twenty-two barrels of spirits claimed by Walker & Co. are part of a lot of thirty-seven barrels purchased at the same time. Only thirty-two of the barrels were distilled by William E. Reed, mentioned in the information. Five were distilled by some one else ; and as to them, there is neither proof nor allegation that there was any violation of law. If these five barrels remained and could be identified as among those seized, they would be restored, of course. But Walker & Co. mixed the whole thirty-seven barrels together in the process of rectifying, and, after rebarreling and selling a portion of the compound, the twenty-two barrels seized remain, so that it is now impossible to identify any of the spirits which were not distilled by William E. Reed. It is possible, and perhaps probable, that five thirty-seventh parts of the twenty-two barrels, or about three barrels in quantity, were not distilled by him. But it cannot be alleged, with absolute certainty, that any part of the five barrels remain. All that can be said is, that it is

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probable. And if any part of them remain, it is, of course, impossible to separate that part from the rest.

If, then, I restore to Walker & Co. three barrels, those barrels will contain some whiskey which has been forfeited, and therefore belongs to the United States. I have no right thus to dispose of the property of the United States. I have no right to make an equitable division between them and the claimants. I am obliged to give to the United States all the spirits which are shown to be theirs. If the claimants, by mixing their own whiskey with that of the United States, have rendered it impossible to identify theirs, they must suffer the consequences of their own act. They made the mixture, it is true, in perfectly good faith, in the regular exercise of their trade and business, and believing that the whole of the whiskey belonged to them; still, by their act they have put it out of their power to give to the United States only what belongs to them. They are obliged, by force of a well known rule of law, to surrender to the plaintiffs all that belongs to them; although in so doing they may be obliged to give up some that belongs to themselves.

If one intermixes his goods with those of another, without his knowledge or consent, so that they cannot be identified, the law does not allow him any remedy; but gives the entire property, without any account, to him whose original dominion or property is invaded. *2 Blacks. Com. 405.*

The order of condemnation must, therefore, include the whole of the thirty-two barrels. Nor does this decision work in this case any real hardship. The United States are actually entitled to thirty-two barrels of the whiskey purchased by Walker & Co. They claim in this suit only twenty-one, leaving with Walker & Co. ten, or the proceeds of ten, which are not claimed, and may never be claimed.

In concluding this opinion, I adopt what the su-

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preme court of the United States said in announcing their decision in a similar case :—" It is true that cases of hardship and even absurdity may be supposed to grow out of this decision ; but, on the other hand, if, by a sale, it is put in the power of an offender to purge a forfeiture, a state of things not less absurd will certainly result from it. When hardships shall arise, provision is made by law for affording relief under authority much more competent to decide on such cases than this court ever can be."

" In the eternal struggle that exists between the avarice, enterprise, and combination of individuals on the one hand, and the power charged with the administration of the law on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature."

Decree accordingly.

UNITED STATES v. HARRIS.

District Court ; District of Kentucky, March T., 1866.

POWERS OF THE PRESIDENT. — REMISSION OF FORFEITURES.

After a judgment in proceedings for a fine, penalty, or forfeiture has been rendered, by which a moiety thereof has become vested in an informer or other individual, it is not within the power of the president by a pardon to remit or release the moiety thus accruing to the individual. His power is limited to a remission of the share of the government only. *So held*, where the conviction took place before

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the enactment of section 9 of the Internal Revenue Act of July 13, 1866, 14 Stat. at L. 146.

It seems, that *before* judgment, where the prosecution is wholly in the name of the United States, the president has complete power over the whole case.

Motion for payment out of funds in court.

Thomas B. Farleigh, for the motion,

B. H. Bristow, District-Attorney, for the government.

BALLARD, J.—On March 15, 1866, J. G. Harris was convicted of having in his possession merchandise subject to duty for the purpose of selling the same with the design of avoiding the payment of duties imposed thereon, and also of the offense of selling cigars, not being the manufacturer thereof, upon which the duties imposed by law had not been paid, with the knowledge thereof.

On the same day, the court rendered judgment against the convict, that he pay a fine to the United States of five hundred dollars on account of the first offense, and one hundred dollars for the second offense, in all six hundred dollars.

On the motion of the district-attorney, the convict was not committed to prison until the fine should be paid, but a *capias* was awarded against him.

On the next day, March 16, John M. Hewitt was, by the judgment of the court, ascertained to be the first informer of the matters whereby the fine imposed on account of the first offense was incurred, and the judgment rendered on the day previous was so far modified that one moiety of said fine, to wit, two hundred and fifty dollars, was adjudged to be for the use of said Hewitt, and the remainder for the use of the United States.

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On April 15, the president of the United States, by his deed of pardon, which recites that the said Harris had been "sentenced to pay a fine of six hundred dollars," remitted to him the payment of two-thirds of the same.

The marshal, who at this time had in his hands said *capias*, assuming that the pardon was fully effective to discharge, according to its tenor, the defendant from the payment of four hundred dollars of said fine, and that the defendant had a right, under the laws of the State of Kentucky, which have been adopted by the United States, to replevy the judgment, allowed the defendant to give his bond, with Walter C. Whittaker and others, sureties, dated May 14, whereby the parties undertook to pay, three months after date, two hundred and fifty-three dollars, with interest from date. This sum is just equal to one-third of the fine and the costs of prosecution. This bond was subsequently satisfied by the payment into court, on December 17, of two hundred and sixty-one dollars and forty cents.

And now R. M. Moseby, the assignee of the informer, has moved the court that the whole sum adjudged to the informer by the judgment of March 16, 1866, be paid to him out of the fund in court, with interest from May 14, the date of the replevin bond.

This motion assumes for its basis that the president had no right to remit any portion of the fine previously adjudged to the informer, and that the informer is therefore entitled to his whole share, just as if no remission had taken place.

The question presented by this motion is an exceedingly interesting and important one. It involves a consideration of the power of the president, under the constitution of the United States, to remit fines, and, so far as I am informed, it has never been determined by either the supreme court or by any circuit court of the United States. I would, therefore, gladly avoid its

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decision if I could ; but every view which I take of the motion submitted only confirms me in the conviction that the question suggested is directly involved, and that its determination can in no way be shunned. But whilst I approach its consideration with unfeigned diffidence, fully impressed with the responsibility which every judge must feel when he is obliged to determine any matter concerning the limit which the constitution has imposed on any department of the government, I have no disposition to shrink from the performance of a duty which I conceive is clearly enjoined on me. Without, therefore, any further apology, I proceed to announce the conclusion to which I have arrived, and to assign some of the reasons on which it is founded.

By section 41 of the act of June 30, 1864, commonly called the internal revenue act, under which this conviction was had, it is provided that "all fines, penalties, and forfeitures which may be incurred or imposed by virtue of this act, shall be sued for and recovered in the name of the United States, in any proper form of action, or by any appropriate form of proceeding : . . . and when not otherwise or differently provided for, one moiety thereof shall be to the use of the United States, and the other moiety to the use of the person, to be ascertained by the judgment of the court, who shall first inform of the cause, matter, or thing whereby any such fine, penalty, or forfeiture was incurred." A similar provision is also to be found in section 179.

It has already been stated that by judgment of this court, rendered March 16, 1866, John M. Hewitt was ascertained to be the person who first informed of the matter, whereby the fine of five hundred dollars was incurred, and that one moiety thereof was then adjudged to him. Did this judgment so vest this moiety in him that it could not be, or rather was not, divested or impaired by the pardon of the president ? This is the

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question which I now proceed to consider. By section II. of article II. of the Constitution of the United States, it is declared that "the president . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." This language is less explicit than that employed in the constitution of Kentucky, and in the constitutions of other States, to confer a like power on the governor. In this, and in other States, the governor is expressly empowered to remit fines and forfeitures, as well as to grant reprieves and pardons. But, although this difference of language might have led to a difference of construction in respect to the extent of the power intended to be conferred, and might have resulted in denying to the president the power of remitting either fines or forfeitures, such, in fact, has not been its effect, for it may be considered as settled that the power of pardon in the president embraces all offenses against the United States, except cases of impeachment, and includes the power of remitting fines, penalties, and forfeitures. 2 *Story Const.* § 1504; *United States v. Lancaster*, 4 *Wash. C. Ct.* 66; *United States v. Wilson*, 7 *Pet.* 161; *Exp. Wells*, 18 *How.* 307.

Conceding, however, that the power of pardon includes the right to remit fines and penalties, still, to understand the extent to which it may be exercised by the president, we must look to the extent of this prerogative rightfully belonging to the executive of that nation whose language we speak, and whose principles of jurisprudence the people of the United States brought with them as colonists, and established here. If the terms "pardon," "*habeas corpus*," bill of attainder," "*ex post facto*," and other terms used in the constitution, had a well known meaning in that language, and in that system of jurisprudence, the conclusion is irresistible that the convention which framed the constitution had reference to that meaning when it

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employed them, and that the people accepted them in that sense when they ratified the work of the convention. But this proposition, impregnable as it seems to be in the light of mere abstract reasoning, is doubly fortified by judicial decisions. *Calder v. Bell*, 3 *Dall.* 390 ; *Watson v. Mercer*, 8 *Pet.* 110 ; *Carpenter v. Pennsylvania*, 17 *How.* 463 ; *United States v. Wilson*, 7 *Pet.* 160. Indeed, the supreme court, in the last case cited, speaking in reference to the very matter we have now before us,—that is, the extent of the power of the president to grant pardons,—says: “As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt these principles respecting the operation and effect of a pardon.”

It follows from this reasoning, and from these authorities, that if the king of England cannot, under his prerogative of pardon, remit, after judgment, the share of a fine given by law to an informer, it is not within the power of the president to do it under the constitution of the United States. Indeed, it would seem absurd to suppose that either the framers of the constitution, or the people who ratified it, intended to confer on the president a power, in this respect, larger than that possessed by the sovereign of Great Britain.

Now I find that the English authorities are uniform to the effect that the king cannot make pardon to the injury or loss of others ; that he cannot, by his act of grace, give away that which belongs to another ; that he cannot divest a vested interest ; in short, that, after an action popular, brought *tam pro domino rege quam pro se ipso* according to any statute, he may discharge his own share as well after as before judgment, but that, after judgment, he cannot remit the part of the informer, because, in the language of the law, this share of the informer is, by the judgment, vested in

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him. 3 *Coke Inst.* ch. 105, 236-238; 2 *Hawkins Pl. of the Crown*, ch. 37, 553; 11 *Coke*, 65, d, 66, a (Foster's Case); *Vin. Abr.* tit. Prerogative, n, a, 7; 5 *Comyn Dig.* tit. Pardons, 245, citing *Strange*, 1272; *Parker*, 289; *Crocker*, 9, 199.

The authorities in the United States are to the same effect, though, as I have already said, the precise question here presented has never been decided. *United States v. Lancaster*, 4 *Wash. C. Ct.* 64; *State v. Simpson*, 1 *Bailey*, 378; *State v. Williams*, 1 *Nott & McC.* 26; *Matter of Flourney*, 1 *Kelley*, 606; *State v. Farley*, 8 *Blackf.* 229; *State v. McO. Blenis*, 21 *Mo.* 272; *Exp. McDonald*, 2 *Whart.* 440; *Duncan v. Commonwealth*, 4 *Serg. & R.* 451; *Playford v. Commonwealth*, 4 *Barr.* 144; *The Hallen and Cargo*, 1 *Mas.* 431. In some of these cases it is expressly stated that by the common law of England, the king, in the exercise of his prerogative of pardon, cannot remit either the share or fine awarded to an informer by the judgment of a court, or the costs of prosecution when they are adjudged to the officers of the court, and it is held that this limit also attaches to the power of pardon conferred on the governors of States by their several constitutions.

Following the mandate of these authorities, my conclusion is, that a proper interpretation of the constitution limits the power of pardon confided to the president, after a judgment ordering a portion of a fine to be paid to a private citizen, to a remission of the share of the government only, and that it is inoperative to divest an interest vested by such judgment in the citizen. What the president may do before judgment, it is, perhaps, not proper for me, in this case, to say; but when the prosecution is wholly in the name of the United States, I see nothing in the foregoing authorities which would deny him complete power over the whole case; for although the cases of *Jones v. Shore*, 1 *Wheat.* 670, and *Van Ness v. Buell*, 4 *Id.* 74, suggest that the in-

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former has a right which attaches on seizure, or at least on the institution of a prosecution, they admit that this right is only inchoate, and is not consummated or vested until judgment.

I have not overlooked the decision of the supreme court in the case of *United States v. Morris*, 10 *Wheat.* 246, in which it is held that the secretary of the treasury, under the power conferred on him by the act of 1797, to remit fines, penalties and forfeitures, may remit, after judgment, the share of the informer, as well as the share of the United States. But it will be seen by reference to the opinion of the court, that they regard this power, conferred by act of Congress on the secretary, as materially distinguishable from the power of pardon conferred on the president by the constitution. The secretary, by the terms of the act, can remit only where the penalty "shall have been incurred without willful negligence or any intention of fraud;" and is, therefore, authorized to administer a sort of equitable relief,—that is, to relieve where, in justice and equity, no penalty should be paid. But the power of the president proceeds on no such principle. He may pardon whom he will, and wholly without respect to the moral guilt or innocence of the legal offender. Moreover, the court rest their decision on the ground that the statute expressly confers on the secretary the power claimed; and recognizing the maxim *cujus est donare ejus est disponere*, they consider that there can be no question that Congress, which gives the right to the informer, may, in its discretion, provide upon what conditions it may be enjoyed or taken away.

Nor have I overlooked the provisions of section 9 of the amended Internal Revenue Act of 1866, 14 *Stat. at L.* 146, which assert that "it is hereby declared to be the true intent and meaning of the present and all previous provisions of internal revenue acts granting shares to informers, that no right accrues to or is vested

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in any informer in any case until the fine, penalty, or forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid, when the informer shall become entitled to his legal share of the sum adjudged or agreed upon and received."

Whatever may be the effect of these provisions in cases arising under this act, it is manifest they cannot affect rights vested previous to their adoption under the law as it then existed. If more was meant by these provisions than to change existing laws; if they were intended to furnish to the courts a rule for the interpretation of previous statutes, I cannot admit their binding force to this extent. It is the province of Congress to make laws, not interpret them. Their interpretation, when made, is confided by the constitution to the judiciary.

Nor has the decision of the court of appeals of this State, in the case of *Rout v. Feemster*, 7 *J. J. Marsh.* 132, escaped my attention. That decision has been understood by some to hold that the governor may remit the share of the citizen in a fine. It will, however, be seen that the case goes only to this extent, that the governor may remit the whole fine, including the portion given by law to the commonwealth's attorney, because by the terms of the statute he is entitled to nothing until the fine is collected. But if the decisions of the courts in this State are to control my decision in this case, it may be well to refer to the case of *Frazier v. Commonwealth*, 12 *B. Monroe*, 369, in which it is held that when the governor remits less than half of the fine, or more than half, the part not remitted, to the extent of not more than half, should be paid to the attorney of the commonwealth. This is an express authority for giving the whole of the fine collected in this case to the informer.

It is due to the president to say that it is very appa-

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rent, from the terms of the pardon granted by him, he was not aware that any portion of the fine adjudged against the convict had been ordered to be paid to an informer. If he was furnished with a copy of the judgment at all, it must have been a copy of that rendered March 15, which, as we have seen, adjudged the whole fine to the United States. If he had seen the judgment as it was modified by the order of the next day, which adjudged two hundred and fifty dollars to be for the use of John M. Hewitt, informer, it is not probable that he would have attempted to impair his right; for I find, by consulting the opinions of the attorney-general of the United States, that the power of the president to remit the share of an informer after judgment has never been expressly affirmed, but, on the contrary, frequently doubted, and often denied.

Let judgment be entered :

That out of the money in the registry of the court, in this case, there be paid to the assignee of the informer two hundred and fifty-eight dollars and eighty-seven cents, which is the amount of the sum heretofore adjudged to the informer, with interest from the date of the replevin bond, May 14, until the day the money was paid into the registry of the court.

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District Court ; District of New Jersey, March T., 1866.

JOINDER IN INDICTMENT. — VIOLATION OF REVENUE LAW.

Where two persons composing a partnership make and sign, in their partnership name, a false return to the assessor of internal revenue, they may be jointly indicted therefor.

Manufacturers of tobacco are not exempt from indictment for violation of the internal revenue laws. The government is not confined to proceedings *in rem*, but may prosecute the individuals concerned, personally.

Motion to quash an indictment.

William Reed, for the motion.

A. Q. Keasbey, District-Attorney, in opposition.

FIELD, J.—This is an indictment against Silas J. McGinnis and George Mountjoy, manufacturers of tobacco, for making a false and fraudulent return under the Internal Revenue Act. The motion is to quash the indictment. There are two classes of objections taken. The former apply only to the first count; the latter go to the whole indictment. I will consider the latter first; for if these are sufficient, the motion must be overruled, although the first count may be defective.

It is objected, in the first place, that the defendants are improperly *joined* in the same indictment. The general rule is, that where two or more join in the commission of an offense, they may be indicted either jointly or separately. The rule is admitted. But it is

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said, there is an exception to it in the case of *perjury*, and that this, although not a case of perjury, is yet analogous to it; or, to use the language of counsel, it is "next of kin." But perjury is no exception to the rule. It is rather an illustration of it. The rule is, when the offense is joint there may be a joint indictment. But in perjury, from the very nature of the case, the offense cannot be a joint one. Nor is this peculiar to perjury. It applies as well to other offenses; such as the speaking of seditious and blasphemous words, or the publication by two booksellers of the same libel. In all these case, the offense is, from its very nature, several and not joint. But when two joined in singing a libelous song, it was held by Lord MANSFIELD, that they might be jointly indicted. *King v. Benfield and Saunders*, 2 *Burr.* 983. So if two booksellers, who are partners, publish a libel, they may be joined in the same indictment. *Archb. Cr. Plead.* 59.

Here the defendants are partners in the business of manufacturing tobacco, and they are indicted for making a false return to the assessor. The return is made and signed by them in their partnership name. It is their joint act; and if the return is false they have committed a joint offense, and may, therefore, be jointly indicted. I do not see how they could be indicted in any other way. It could hardly be said that the false return was the act of McGinnis alone, or the act of Mountjoy alone. It was the joint act of the firm of McGinnis & Mountjoy. There is nothing, I think, in this objection.

The other objection goes, not only to the substance of the indictment, but it strikes at the foundation of the whole prosecution. The criminal provisions of the Internal Revenue Act, it is said, do not apply to the manufacturers of tobacco. They may be proceeded against *in rem*, but not by way of indictment.

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I confess I was somewhat startled by this proposition. It was an entirely new idea. And I said to myself, while counsel was urging it so earnestly, can this be so? Is it possible that Congress, after all the pains they have bestowed upon this act, and the repeated revisions to which they have subjected it, should have made this serious omission? If the business had been one from which little or no revenue was expected, we could better understand how Congress might have overlooked it. But it is a business from which a larger amount of revenue is derived than from almost any other single source. It is a business, too, in which the temptations to fraud, and the facilities for committing it, are greater, perhaps, than in any other, owing to the fact that the duties are so high, and the articles so easily concealed. It might have been supposed, therefore, that when the criminal provisions of the act were framed, Congress would have had in view, *in an especial manner*, the manufacturers of tobacco. And yet, we are told, they are the very manufacturers to whom these criminal provisions do not apply. You may seize their tobacco, if they happen to have any on hand, when their frauds are discovered, but they are not liable to indictment.

Let us see if this be so. Section 15 of the Internal Revenue Act, 13 *Stat. at L.* 227, provides "that if *any person* shall deliver or disclose to any assessor or assistant assessor appointed in pursuance of law, any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made," he shall, on conviction, be fined in any sum not exceeding one thousand dollars, or be imprisoned for not exceeding one year, or both, at the discretion of the court. And by section 82, the word "*person*" is made to include "partnerships, firms, associations, and corporations." *Id.* 258.

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Section 15 would seem to be as comprehensive as language could make it, and to embrace within its scope every possible case of a false or fraudulent return. But still, it is said, it does not apply to the manufacturers of tobacco. Why? The argument, if I understand it, rests entirely upon an expression which occurs in section 11. By that section it is provided, "that it shall be the duty of any person, partnership, firm, association, or corporation made liable to any duty, license, stamp, or tax imposed by law, *when not otherwise provided for*, on or before the first Monday of May in each year, and in other cases before the day of levy, to make a list or return, verified by oath or affirmation, to the assistant assessor of the district where located, of the amount of annual income, the articles or objects charged with a special duty or tax, the quantity of goods, wares, and merchandise made or sold, and charged with a specific or *ad valorem* duty or tax," &c. 13 Stat. at L. 225. This section simply requires *yearly* returns of incomes and articles subject to taxation. *Yearly* returns were thought to be sufficient in ordinary cases. But there were associations, and there were manufacturers, from which, it was believed, more frequent returns ought to be required, and these were to be provided for in subsequent sections. Among these were the manufacturers of tobacco. Hence the introduction of the words "*when not otherwise provided for*." These words *do* show that section 11 was not intended to apply to the manufacturers of tobacco. But how do they show that the provisions of section 15 are not applicable to them? What possible bearing or effect can they have upon the latter section? The case, then, stands thus: By section 11, yearly returns are required, unless in cases otherwise provided for. The case of manufacturers of tobacco is otherwise provided for in section 90. Monthly returns are there required of them. But by section 15, "any false or fraudulent re-

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turn" is an offense, to be punished by indictment. Why does not this apply equally to the yearly returns required by section 11, and the monthly returns required by section 90, from the manufacturers of tobacco? Can any possible reason be assigned why yearly returns, if false, should be the subject of an indictment, and not monthly returns?

Such would be a fair, and, I think, a necessary construction of the act, even if section 90 did no more than provide for monthly returns by the manufacturers of tobacco. But, as if to remove all doubt upon this subject, and make assurance doubly sure, there is a clause inserted in section 90, which seems to render all further reasoning unnecessary. After providing that manufacturers of tobacco shall make returns or statements to the assessor on or before the tenth day of each month, and that in case the duties are not paid within five days after demand thereof, distraint may be made for the amount thereof, with ten per cent. additional, we find these significant words: "Subject to all the provisions of law relating to licenses, *returns*, assessments, payment of taxes, liens, fines, *penalties*, and forfeitures, not inconsistent herewith, in the case of other manufacturers."* 13 *Stat. at L.* 474.

The clause was not, perhaps, necessary, and might be deemed superfluous. And yet, it seems to have been inserted out of abundant caution, and as if to guard against just such an objection as that which has been taken. It is in effect saying, that although monthly returns, and returns of a peculiar nature, are required of the manufacturers of tobacco, they shall,

* In the amendment of section 90, by the act of July 13, 1866, 14 *Stat. at L.* 124, 125, the words quoted in the opinion above are omitted, and the following clause inserted: "And all the provisions of law relating to manufacturers generally, so far as applicable and not inconsistent herewith, shall be held to apply to the manufacture of tobacco, snuff, and cigars."

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nevertheless, be subject to all the provisions of the act relative to false returns, and the penalties consequent thereon, as in the case of other manufacturers.

It was intimated that by the word "penalties" in this clause, was meant pecuniary penalties, and not liability to indictment. But there are no pecuniary penalties provided for the making of false returns, otherwise than by indictment. Unless, then, manufacturers of tobacco can be proceeded against by way of indictment for making false and fraudulent returns, they are liable to no penalty whatever. Such, certainly, could not have been the intention of the act.

I am of the opinion, therefore, that the criminal provisions of the Internal Revenue Act do apply to the manufacturers of tobacco. If I am right in this conclusion, the motion to quash must be denied, without considering the objections which have been taken to the first count of the indictment.

It was stated by the learned counsel who argued this case upon the part of the defendants, that in the State of Pennsylvania there had been no criminal prosecutions under the Internal Revenue Act. They had been satisfied there with proceedings *in rem*. But in this State, such proceedings have been found in many cases to furnish a very inadequate remedy. There have been, therefore, a number of criminal prosecutions in this court. And there have been convictions, too. And it is come to be generally understood, that where individuals or associations are guilty of making false and fraudulent returns, they expose themselves, not only to seizure and forfeiture of their property, but to fine and imprisonment. To this may be owing, in part, the remarkable fact, that while New Jersey is but the sixteenth State in the Union, in point of population, there are but five that contribute so large an amount as she does to the internal revenue of the government. It is to the vigilance and fidelity of our revenue officers,

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and the effective manner in which the provisions of the act are carried out, that I believe this result is in some measure to be ascribed.

The motion to quash is denied.

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*District Court; District of Wisconsin, January T.,
1867.*

MERCHANT SEAMEN.—RIGHT TO BE CURED.

A seaman who has received an injury or contracted a disease while in the service of the ship, is entitled to be cured or cared for at the expense of the ship. This right is an ingredient in the compensation to be paid to the seaman under the contract of shipment; and is enforced by an award of additional wages.

The general rule that a seaman is entitled to be cured at the expense of the ship, is applicable to seamen employed on the lakes and navigable rivers within the United States.

The claim of a seaman to be cured at the expense of the ship is not forfeited because the hurt or sickness may have been incurred through his negligence, unless something more is shown than mere ordinary carelessness, consistent with good faith in the prompt discharge of duty in obedience to orders. To forfeit the claim, the disability or sickness of the seaman must be owing to vicious or unjustifiable conduct; such as gross negligence operating in the nature of a fraud upon the owners,—willful disobedience to orders,—persistent neglect of duty.

It seems, that where the sickness or disability of the seaman is caused or aggravated by the neglect or misconduct of any of the officers of the ship, an allowance may be made to the seaman for the expenses of his care, beyond the termination of the voyage.

But in the absence of misconduct or neglect on the part of some officer,

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the obligation of the vessel to provide for a disabled or sick seaman is only co-extensive with the obligation of the seaman to the vessel. It terminates, in ordinary cases, when the shipping contract is dissolved.

Hearing upon a libel in admiralty.

This was a libel in the nature of a libel for wages, filed by Stephen Morgan against the schooner Ben Flint, to recover for expenses of curing the libelant of an injury received while in the service of the vessel.

It appeared by the proofs that the schooner was employed in transporting lumber from ports on Lake Michigan, in the State of Michigan, to the port of Chicago, in the State of Illinois. The libelant was employed as a seaman on board her during the summer of 1866; contracting before departure on each voyage at the rate of wages then current. In the month of September he shipped on board, at Chicago, as seaman for the round trip to Manistee. She carried lumber, in the hold, and on deck in the usual manner of stowing lumber on deck, leaving a passage way to and from either side forward of the main mast and cabin. The lumber near the main mast being stowed about four and a half feet above deck, the main boom was brought up to an elevation above the lumber of about eighteen inches, and supported by blocks placed on the saddle and resting against the main mast. It was known to all on board that these blocks were not fastened to the main mast, and that the boom was so elevated solely for the purpose of managing the vessel. The vessel being about to enter the harbor at Chicago on her return trip, the wind blowing fresh, an order was given by the officer in command to take in the mainsail, which extended over the starboard side. When the order was given, the libelant and two other seamen, who were standing on the larboard side of the vessel forward, immediately proceeded to that duty. One of

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the seamen, about three feet from the main mast, crawled through the space between the lumber and the boom; and libellant following, was hurt by the boom dropping across his back. The third seaman proceeded along the passage way. The wind blowing fresh, no doubt, caused the boom to drop, although it was secured in the usual way from shifting. The vessel moored at her dock in Chicago, when the officers desired libellant to go to the marine hospital in that city; but he preferring to leave for his home in Milwaukee, they paid him his full wages, and for one day extra, and assisted him to the cars for Milwaukee.

The hurt rendered libellant unfit for duty for several days, requiring medicine and medical advice, nursing and attendance in Milwaukee; to recover for which this libel is brought.

Libellant was not an experienced seaman on board a sailing vessel, but was obedient and dutiful.

Stark & Mullen, for libellant.

Emmons & Vandyke, for claimant and respondent.

MILLER, J.—It is contended that the officers of the vessel had neglected their duty in not fastening to the main mast the blocks upon which the boom rested. This, I think, is not tenable. The blocks were placed against the main mast in the usual manner, known to all on board, merely for the temporary support of the boom. The object of the elevation of the boom, and the existence of the passage way, were equally well known. If no passage way had existed, or if libellant had been required or ordered to pass under the boom,—in either case the vessel would be in fault in not securing the blocks or the boom from dropping. I do not think the vessel was in fault in this respect.

It is not necessary to prove by authorities that a

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seaman, having received an injury or taken sick whilst in the service of the ship, without his fault, is to be cured, or rather cared for, at the expense of the ship. This rule is very ancient, and is universally recognized. Sound policy in favor of commerce, to induce seamen to ship for long voyages, and to perform laborious and hazardous duties on board, and also intrinsic equity sanction the rule. The rule is beneficial to the owner, while he may deem it onerous. It encourages seamen to ship on lower wages, diminishes temptation to plunder, and encourages them in the discharge of duty; and the master will be watchful of their health, and careful of their exposure to disease and accidents. The right to claim for such expenses, or such duty on the part of the ship or vessel, in contemplation of law, is a part of the contract for wages, and a material ingredient in the compensation for the labor and services of the seaman. And in the admiralty a remedy may be applied on the principle of additional wages; and in case of neglect or injuries of the seaman on the part of the ship's officers, it may be extended beyond the time of shipment or the return of the vessel to her home port. The services of a seaman are maritime, and whatever enters into the compensation for such services, and is reducible to money, is in equity decreed as a just remuneration for such services.

This ancient and now universal marine rule, is as applicable to seamen or mariners on the lakes, and on rivers flowing into the ocean, as on the high seas. Seamen or mariners on board boats or vessels employed in navigable fresh waters within the admiralty jurisdiction of the United States are merchant seamen, and are entitled to all rights, and subject to all duties as such. But upon the equitable principle of the marine law, the same consideration under the rule may not be extended indiscriminately to all classes of seamen. Humanity, and the interests of commerce, demand a liberal exten-

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sion of the rule towards seamen on vessels employed in foreign trade. But the same liberality need not be extended to a seaman shipping for a voyage for a few days on the lakes,—particularly when additional wages are demanded at the commencement of each voyage. It appeared that libelant demanded increased wages before shipping for each voyage, as the season advanced. And he knew that a marine hospital existed in Chicago, where seamen are cared for after being discharged from service, and where the officers of the vessel wished him to go. It is true that libelant was not obliged to enter the marine hospital as a patient.

Claimant's advocate contends that libelant was in fault for passing over the lumber and under the boom, and cannot therefore sustain his libel. To entitle a sailor to sustain a libel for care and attendance, required in case of sickness or personal injury while in the service of the vessel, the disability must have occurred without his fault. Libelant testifies that he took the course over the lumber to save time; but he had better have said that he thoughtlessly followed the lead of a reckless brother sailor. Sailors are wards of the admiralty, and are rather excused than condemned for accidental mistakes while in the faithful and obedient discharge of duty. Even after punishment for willful disobedience, if they return to duty, their full wages in many cases are allowed. A strict rule of forfeiture should not be applied to a sailor. What may be negligence or fault in persons employed in service on land, may not be in sailors employed on board of vessels. Ordinary negligence, consistent with entire good faith, as in this instance, should not prejudice a sailor's just rights. The marine law rather overlooks ordinary negligence, but punishes those gross faults and vices which affect or prejudice the ship's service or discipline. The accident occurred to libelant while in the prompt discharge of duty, in obedience to a proper command.

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The dropping of the boom was unforeseen, and not caused by him. Under such circumstances, I do not think that libellant was in fault. To forfeit a claim for care or attendance under the rule, the disability or sickness of the seaman must be owing to vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, willful disobedience to orders, and persistent neglect of duty. *Walton v. The Neptune*, 1 *Pet. Adm.* 142; *Reed v. Canfield*, 1 *Sumn.* 195; *Johnson v. Huekins*, 1 *Sprague*, 67; *Pierce v. The Enterprise*, *Gilp.* 435; *The Nimrod, Ware*, 1.

The following cases will explain the principle upon which relief has been allowed sick and disabled seamen: In *Harnden v. Gordon*, 2 *Mas.* 541, the rule is elaborately discussed, and the court came to the conclusion that the expense of curing a sick seaman in the course of the voyage is a charge on the ship, and in this charge are included not only medicines and medical advice, but nursing, diet, and lodging, if the seaman be carried ashore; that the court of admiralty has jurisdiction to enforce the payment of these expenses, by a libel, for they are in the nature of additional wages during sickness; and that no stipulation contrary to the maritime law to the injury of seamen will be allowed to stand, unless an adequate additional compensation is given to them. In the case of *The George*, 1 *Sumn.* 151, the mate took sick during a foreign voyage, and was put on shore, where expenses were incurred for medicines, medical advice, and attendance. It was adjudged that the ship owner should be held liable. In the case of *The Nimrod, Ware*, 1, a suit for mariner's wages, no deduction was allowed for expenses attending the sickness of a seaman during the voyage, exceeding the balance of his wages. And in *Freeman v. Baker*, 1 *Blatchf. & H.* 372, it is decided, that a promise of a seaman, sick in a foreign port

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during the voyage, to pay bills for his medicine, &c., is void, and does not release the ship of liability. See, also, *The William Harris, Ware*, 373; *Brundet v. Tober*, 1 *Sprague*, 243; *Ringold v. Crocker, Abb. Adm.* 344; *The Atlantic, Id.* 452; *Walton v. The Neptune*, 1 *Pet. Adm.* 142, note.

The following cases extend the benefit of the rule beyond the time of service of the seaman, as limited by the shipping articles; but it will be observed that misconduct on the part of the officers of the vessel formed an essential ingredient in each case:

In *Reed v. Canfield*, 1 *Sumn.* 189, the ship *Albion* having been employed in a whaling voyage on the Pacific, came to anchor in the harbor of New Bedford, her home port. The master soon after landed, and gave permission to one of the mates also to go on shore. Both of the mates expressed a desire to avail themselves of this permission, on the return of the boat from landing the master. They both concluded to go on shore, taking with them a boat's crew. The ship being left without officers to enforce discipline, the boat's crew, including libellant, remained on shore after landing the mates, until a storm ensued, which rendered the passage of the boat from shore to the vessel tedious; and libellant's feet were so frozen that they had to be amputated. The disability to libellant would not have happened but for the unwarrantable departure of the officers from their duty.

In *Brown v. Overton*, 1 *Sprague*, 462, libellant, a seaman on board the ship *Madison*, in a voyage from Calcutta to Boston, while reefing a top sail, was thrown from the yard by the sudden motion of the sail and violence of the wind, and broke both of his legs. The master, with the aid of a passenger and one of the crew, set the bones, and secured them in bandages and splints as well as they could. Libellant was placed in a hammock, and continued lying in it until four days

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after the arrival of the ship at Boston, without proper attention, when he was removed to a hospital. He was decreed indemnity for all he had suffered from the omission of the master to go into Saint Helena, the nearest port after the accident, for surgical aid, and the master's culpable neglect of him during the voyage and after arriving at Boston, including expenses incurred after leaving the ship.

In the case of *Croucher v. Oakman*, 3 *Allen*, 185, at law, the plaintiff was allowed to recover for damages from the unlawful act of the master in wounding and then discharging him in a foreign port, while employed in the prosecution of a voyage. The plaintiff was allowed for necessary expenses at the foreign port, and for his return, months after the time mentioned in the shipping articles.

And in *Mosely v. Scott*, 14 *Am. Law Reg.* 599, at law, plaintiff shipped on board a steamboat as cabin-boy, for a trip to Nashville and back to Cincinnati. During the voyage he became sick with small-pox to such a degree that he was not able to attend to his duty, and was compelled to take to his bed on board, where he remained until the return of the boat. The master and officers of the boat during his confinement on board neglected to furnish him with sufficient medicine, medical advice, attendance, nursing, and diet necessary for his comfort and cure. By reason of such neglect, plaintiff's feet were so frozen that they had to be amputated, which confined him in a hospital several months. A demurrer to the petition, according to the practice in the State of Ohio, was overruled. See also *Nevitt v. Clarke*, *Ol.* 316, where the ship in a foreign voyage was sold to foreigners without arrangements being made for the return of a sick seaman.

These are all the American cases that I have had access to. In the first class, misconduct or neglect of the officers of the vessel was not material. In the second

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class, their misconduct and neglect towards the seaman became an important item for the consideration of the court. Upon every principle of humanity and equity, owners of vessels should be held liable, in amount measured by the actual loss to the seaman, for his sickness or disability caused or aggravated by the misconduct or neglect of their officers.

From this review of American cases I have arrived at the conclusion that, in the absence of misconduct or neglect on the part of the officers, the obligation of the vessel to provide for a disabled or sick seaman, should only be co-extensive in duration to that of the seaman to the vessel. The privileges and liabilities of the parties are, in contemplation of law, measured by the shipping articles. Interests of commerce do not require that the privileges and duties of ship owners and seamen should be extended beyond the reason, nature, and terms of the shipping contract, unless for fault, misconduct, or neglect on the part of officers of vessels towards their seamen; or perhaps, when the removal of a sick or disabled seaman from the vessel, or a change of treatment then being practiced might prejudice his recovery within a reasonable time. Humanity and equity might require indulgence in extreme cases. Libellant received the hurt complained of without fault on the part of the officers of the vessel while coming into the port of discharge; and after his discharge and receipt of his wages, he traveled by land about ninety miles to the city of Milwaukee. He cannot recover against the vessel for expenses incurred by him in this city, and his libel must be dismissed.

Decree accordingly.

UNITED STATES v. NELSON.

District Court; Western District of Michigan, October T., 1867.

COUNTERFEITING.—SELLING SPURIOUS NOTES.

Under a statute which punishes one who shall "utter" or "pass" spurious notes, knowing them to be such, with intent to defraud, and which does not in terms require that they be uttered as true or genuine (Act of June 30, 1864, 13 Stat. at L. 221, § 10), a defendant may be convicted of *uttering* or *passing*, upon proof that he *sold* and delivered the notes as spurious notes to another person with intent that they should be passed upon the public as genuine.

The words "uttering" and "passing," used of notes, do not necessarily import that they are transferred as genuine; the terms include any delivery of a note to another for value, with intent that it shall be put into circulation as money.

The fact that other provisions of statute exist which expressly provide a punishment for *selling* spurious notes, does not prevent convicting a defendant under an indictment for *passing, uttering, and publishing* such notes, upon proof that he sold them as spurious, with intent that the purchaser should cause them to be put in circulation as genuine.

Motion for a new trial upon an indictment.

John T. Holmes and *L. Patterson*, for the motion.

A. D. Griswold, District-Attorney, and *E. S. Eggleston*, for the government.

WITHEY, J.—The respondent, Theodore Nelson, was indicted in May last, and tried at the present October term on a charge of *passing, uttering, and publishing* a counterfeit United States fractional note with

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intent to defraud the United States. The trial consumed ten days, and resulted in a verdict of guilty.

At the coming in of the verdict, a motion was made for a new trial, on the ground of evidence improperly admitted.

The proof was, that a person employed by the government officials, as a detective for the purpose, applied to Nelson for counterfeit money, to be, by the detective, put in circulation.

Negotiations were had between them, and resulted in Nelson selling to Mitchell, the detective, four hundred and ten dollars of spurious United States notes, for which he received in good money and a promissory note, one hundred and thirty-three dollars.

When the testimony was offered objection was made, that on a charge for *passing*, proof of *selling* was not admissible. The objection was overruled, and the testimony admitted. It is this ruling that forms the basis of the motion for a new trial.

It is urged by learned counsel in behalf of the respondent, that it is no offense, under the act of June 30, 1864, to *utter*, *pass*, and *publish* counterfeit notes *as and for spurious*; that the offense charged is committed only when the notes are passed, uttered, or published *as true*; that the words *pass*, *utter*, *publish*, import "*as true*;" that *to pass* is to *put into circulation*, as WORCESTER defines "*pass*," and therefore to dispose of *false* notes *as and for spurious* is *not passing*,—i. e., is not putting them into circulation.

It is said that Congress has by another statute, viz: the act of February 5, 1867, created the offense of *selling*, under which Nelson might and should have been indicted; hence *selling* spurious notes is a distinct offense for which there can be no conviction under a charge of having passed, uttered, and published; that the charge should have been for selling.

It is true, that it has been held that *uttering* is

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a declaration that the note is *good*, and that to offer it as genuine is an uttering—that to constitute an uttering there must be an intent to pass the note as good. *United States v. Mitchell*, 1 *Baldw.* 367, and cases there cited.

But what is the statute under which the indictment is found, and what its meaning? The act of June 30, 1864, defines the offense to be, "to utter, pass, publish, or sell counterfeit United States notes, knowing them to be such, with intent to deceive or defraud." There is an omission of the words "as true or genuine," or any equivalent words.

Whatever reason may have existed in the mind of the pleader who drafted the indictment for omitting to charge the respondent with having *sold* the notes, is not important to know. The single question which I find it necessary to determine is, whether, under the statute last referred to, any *delivery* of a spurious note to another for value, for the object or purpose of being passed or put into circulation as and for money, is a passing within the meaning of the act of Congress.

Mr. Justice BALDWIN, in the case referred to, says: "The note is uttered when it is delivered for the purpose of being passed. When put off it is passed." In the case of *State v. Wilkins*, 17 *Vt.* 151, the indictment charged the defendant with having "uttered, passed, and given in payment one certain false, forged, and counterfeited bank note, with intent to defraud;" and the supreme court say: "It is objected to this indictment that it is not alleged that the bill was passed as a *true bill*." The court also remark, the statute 15 *Geo.* 2, provided "that if a person should utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, he should on conviction be subject to certain penalties." Under this statute, in the case of *King v. Franks*, 2 *Leach Cr. L.* 644, the indictment charged the respondent simply with *uttering* a piece of false and counterfeit money,

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and it was held that the offense was complete, even though it was uttered as base coin. In that case the indictment did not state the uttering to have been in payment *as and for a piece of good money*, and if it had, the evidence in the case would have rebutted the charge." The court further on say, neither in the statute of 1818, nor in the Revised Statutes of Vermont, is it made a part of the description of the offense that the counterfeit bill should have been uttered, passed, or given in payment as and for a *true* bill; and the court held the indictment good.

Again, in the case of *Hopkins v. Commonwealth*, 3 Metc. 460, when the statutory offense was having in possession any counterfeit bank bills, with intent to *pass*, knowing the same to be counterfeit, and the indictment charged in the language of the statute, the supreme court of Massachusetts say the omission of the words "*as true*," strengthens the conclusion that the legislature intended to prohibit the passing of counterfeit bills *as money, or to be used or passed as money*, by any person at *any rate of discount, or otherwise*, whether as between him and the immediate receiver *they were passed as true or not*.

And further on in the case, the court say: "The word 'pass,' as used in the statute, and generally as applied to bank notes, is technical, and means to deliver them as money, or as a known and conventional substitute for money." And therefore to sustain such indictment,—*i. e.*, an indictment for passing,—"it must be proved that the party who is charged, passed the counterfeit bill to another for some valuable consideration, or otherwise *as for money, or as to be used for money*, with the guilty purpose of defrauding the community."

I find no case in conflict with those I have referred to; hence the conclusion at which I arrived when the question arose on the trial is not shaken but confirmed.

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The Congress of the United States has defined it an offense to utter, pass, publish, or sell a counterfeit United States note, with intent to deceive or defraud, omitting the words "*as true*," or any equivalent words. The manner of passing, or the terms upon which the notes are put off or disposed of, are not material, so long as the delivery or putting off of the false notes be as and for money, in lieu of money, or to be used as and for money, with intent to deceive or defraud.

And whether the receiver knew the notes were false or not; whether he took them at what their face purported, or for one-half, or one-third, or any other value, if the purpose was to put them into circulation *as money*, it is not only passing, but as the tendency would be to defraud the government, it must be held to be passing with intent to defraud the United States. A sale and delivery for circulation of forged notes is a felonious passing within the act of Congress.

Pass, utter, publish, and sell, are in some respects convertible terms, and, in a given case, *pass* may include utter, publish, and sell.

So far as the act of February 5, 1867, is repugnant to, or inconsistent with, the act of June 30, 1864, it should be held to repeal the latter; but I am not inclined to take the view that there is any repugnancy. I think a given case may be presented under either statute, and this case is one of them. In the one case, under the act of June 30, 1864, the indictment must charge the passing to have been with intent to deceive or defraud; to prosecute for the same act of passing under the statute of February 5, 1867, the indictment must charge the passing to have been with intent that the false note *will be passed as true*.

In conclusion, I would remark, that I have, by letter, referred the questions arising under this motion to my learned brother, Justice SWAYNE, who writes me he

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has examined the authorities, and is satisfied that I decided aright. Sustained by the high authority of this learned justice of the supreme court of the United States, I am doubly assured that the judgment which I pronounce is no denial of legal rights to the respondent.

The motion for a new trial is denied.

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District Court; District of Kentucky, December T., 1867.

HABEAS CORPUS.—JURISDICTION OF STATE TRIBUNALS.

Where it appears by the return to a writ of *habeas corpus*, issued by a State tribunal, that the respondent holds the petitioner under authority, or color of authority from the United States, the State tribunal or officer has no jurisdiction to proceed further, but must discharge the writ.

The question whether such authority is valid cannot be examined in a State court; but is within the exclusive jurisdiction of the tribunals of the United States.

A commander in the army of the United States made return to a writ of *habeas corpus* issued by a State court, showing that he held the petitioner as a recruit in the army, and pursuant to laws of the United States regulating enlistments. The State court examined the validity of the enlistment, determined it to be invalid, and directed the recruit to be discharged. The officer refused to discharge him, and the State court committed the officer for contempt. *Held*, by the district court on a *habeas corpus* sued out by the commander, that the State court exceeded its jurisdiction in examining the validity of the enlistment; that it had no power to proceed beyond ascertaining that the officer held the recruit by color of authority from

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the United States; and that the officer, in detaining the recruit notwithstanding the order of discharge by the State court, acted in pursuance of a law of the United States, and being imprisoned therefor by the State court was himself entitled to be discharged by virtue of the act of March 2, 1833.

Hearing upon a writ of *habeas corpus*.

B. H. Bristow, District-Attorney, and *T. R. Hallam*, for petitioner.

John F. Fiske, for respondent.

BALLARD, J.—On December 9 the relator, Charles E. Farrand, presented to this court a petition showing that he was held in confinement by Thomas Fowler, Marshal of the city of Newport, “for an act done or omitted to be done in pursuance of a law of the United States,” and praying for a writ of *habeas corpus*. The petition, on its face, presenting a case which clearly entitled the relator to relief under the provisions of section 7 of the act of Congress of March 2, 1833, and perhaps also under the act of February 5, 1867, the writ was issued, directed to the Marshal of Newport.

In obedience to this writ the marshal produced in court the body of the relator, and made his return showing that he holds him by virtue of an order made by the mayor’s court of Newport, in a regular proceeding before it. The marshal makes part of his return the proceedings had before the mayor’s court, and has exhibited certified copies of them.

From these proceedings it appears that on November 7, 1867, on the petition of Jane Johnson, representing herself as the mother of Archibald Johnson, a writ of *habeas corpus* was issued by the mayor’s court of Newport, directed to the commander of Newport Barracks, commanding that officer to bring before it Archibald Johnson, illegally detained, as was alleged,

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together with the cause of his capture and detention. This writ being served on the relator, who was in temporary command of the barracks, he in due time made his return in substance as follows :

"I have the honor to make return to the within writ of *habeas corpus* that the within named man is a duly enlisted soldier in the army of the United States at Newport Barracks.

"I also deny the jurisdiction of the mayor's court or any State court of the State of Kentucky, and recognize only the jurisdiction of the United States courts in cases of this kind.

"I do not intend any disrespect in the above return to the court of his honor Mayor Buchanan, but must respectfully decline obeying the writ through a sense of duty."

The relator also exhibited with his return a copy of the enlistment of the soldier, which shows that he was duly and regularly enlisted as a soldier in the army of the United States, April 22, 1867 ; that the oath required by law was administered to the recruit by an officer authorized to administer such oath ; that the recruit was regularly examined by the surgeon appointed for that purpose ; and that he made his declaration, *to the truth of which he swore*, in which he, among other things, states that "I am twenty-one years and nine months of age."

Notwithstanding this return and exhibit, the mayor's court proceeded with the case, and made an order to the effect, "it appearing upon proper proof that said Archibald Johnson was enlisted when he was under age of seventeen years, without the consent of his mother, and that he has no guardian, he is discharged."

But the relator refused to obey this order, and continued to hold the recruit in the United States service by virtue of his enlistment. For this refusal the may-

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or's court proceeded against him by process of contempt, and it is under this process that he is now in confinement.

I have not set forth all the proceedings which took place in the mayor's court, but have stated all that are material.

The relator filed a paper in the nature of a traverse to the return of the marshal, in which he reiterates all the facts set forth in his return made to the writ issued from the mayor's court, and alleges that, though he is in confinement for an alleged contempt of an order of said court, he is really confined for detaining a soldier duly enlisted in the service of the United States, and for omitting to discharge him, as he was bound to do under the laws of the United States. He claims that he is in confinement for an act done or omitted to be done in pursuance of a law of the United States.

Section 7 of the act of Congress of March 2, 1833, 4 *Stat. at L.* 634, provides, "That either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of a prisoner . . . in confinement when he . . . shall be committed or confined . . . by any authority or law, for any act done or omitted to be done in pursuance of a law of the United States."

It is wholly immaterial whether the act of the relator is to be regarded as an act of commission in that he detained the recruit, or as an act of omission in that he refused to discharge him; for whether it is the one or the other it is equally within the terms of the act of Congress, if it was "done in pursuance of a law of the United States."

The question then arises, had the relator a right, under the laws of the United States, to retain the recruit and refuse to discharge him?—and this presents

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the further question, had the mayor's court any jurisdiction to discharge him ?

That the relator had the right and was required to detain the recruit as a regularly enlisted soldier in the army of the United States, unless the order of discharge made by the mayor's court annulled his right, is not questioned and is unquestionable. I proceed, therefore, at once to consider the question of the jurisdiction of the mayor's court, as the only question presented in the case ; for it is hardly necessary to state that if the mayor's court, notwithstanding the return made to it showing that the soldier was held under the authority of the United States, had the jurisdiction to discharge him, then the relator is lawfully in confinement, and cannot be relieved by this court ; but if that court had no such jurisdiction, then its order to discharge is void, not binding on the relator, and he is in confinement for detaining the soldier, as he was required to do by law,—that is, “for an act done in pursuance of a law of the United States.”

The question thus presented is one of vast importance, and I have endeavored to bestow upon it that deliberation which its importance demands. It involves much more than the question whether the recruit, Johnson, shall remain in the army of the United States until his term of enlistment expires, or shall be at once discharged. It involves much more than the question whether the mayor's court of Newport has jurisdiction by *habeas corpus* to discharge a minor regularly enlisted in the army. It involves the further question whether *any* State court has jurisdiction, under such writ, to discharge the prisoner, when it is shown to it that he is held under authority of the United States ; for if any State court has such right, I see not why it is not possessed by the mayor's court.

From the beginning of the government down to the decision of the supreme court of the United States in

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1858, in the cases of *Ableman v. Booth*, and *United States v. Booth*, 21 *How.* 506, I suppose the very decided preponderance of authority in the State courts sustains the jurisdiction of those courts to discharge upon *habeas corpus* prisoners who, in their judgment, are illegally held, though held under the authority of the United States. The cases will be found collated in *Hurd on Habeas Corpus*, 164-202. The jurisdiction, it is true, had been frequently disclaimed by able State judges; as by Chief Justice LANSING in 1799, *In re Husted*, 1 *Johns. Cas.* 136; by Chief Justice NICHOLSON in 1809, *In re Roberts*, 2 *Hall's Law J.* 192; and by Chief Justice KENT in 1812, *In re Ferguson*, 9 *Johns.* 239. But, as I have said, down to the decision in the case of *Ableman v. Booth*, the preponderance of State decisions was the other way, though since that decision the weight of authority even in the State courts is against the jurisdiction. *State v. Zulich* (1862), 29 *N. J. L.* (5 *Dutch.*) 409; *In re Spangler* (1863), in the supreme court of Michigan, 2 *Am. Law Reg. N. S.* 508; *Matter of Hopson* (1863), 40 *Barb.* 43-59; *In re Jordan* (1863), 2 *Am. Law Reg. N. S.* 749. I have seen other decisions of State courts cited as supporting this view, but as they have not been accessible to me, I will simply enumerate them, that they may be consulted by those who shall have opportunity. *State v. Janeway*—opinion by E. DAYTON OGDEN, J., of the supreme court of New Jersey, reported in *Newark Daily Advertiser*, December 15, 1862; *In re Bully*, in New York court of common pleas—opinion by DALY, J., reported in *New York Tribune* and *Herald* of March 19, 1867; *In re O'Connor*, in New York supreme court—opinion by INGRAHAM, J., reported in *New York Tribune*, December 27, 1866. And see 2 *Abb. Nat. Dig.* 609, note.

The decisions and opinions in the district and circuit courts of the United States, both before and since the decision in *Ableman v. Booth*, have denied the

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State jurisdiction. *In re Kuler* (1843), 1 *Hempst.* 306 ; *Morris v. Newton* (1850), 5 *McLean*, 99-101 ; *In re Veremaitre* (1851), U. S. District Court, Southern District of New York, and cited as reported in 9 *N. Y. Leg. Obs.* ; Charge to the grand jury by NELSON, J. (1851), 1 *Blatchf., Appendix* ; *In re Sifford* (1857), U. S. District Court for Southern District of Ohio, 5 *Am. Law Reg.* 659 ; *In re McDonald* (1861), District Court for Missouri, 9 *Id.* 661 ; *Conk. Tr.* 4 ed., 583-585.

The current of opinions in the courts of the United States is, so far as I know, absolutely unbroken, except by a single opinion recently rendered by the learned district judge for the northern district of New York, in the matter of William Reynolds on *habeas corpus*, and published in the *Buffalo Daily Courier* of July 27, 1867. I have examined this opinion with great care, and while I assent, though not without some hesitation, to the *decision* made, I cannot but regard much that is said as not properly belonging to the case before the court. The prisoner, Reynolds, being in custody under color of authority of the United States, the learned judge sitting as a judge of the United States had unquestionable jurisdiction under the express terms of section 14 of the Judiciary Act of 1789, to inquire by *habeas corpus* into the cause of his detention, and to discharge him if he found the detention illegal ; and when he decided that the previous refusal of a State judge to discharge the prisoner, no matter whether the State judge had jurisdiction or not, was no bar to his inquiry, I cannot see that anything he says respecting the jurisdiction of State courts to discharge upon *habeas corpus* persons held under color of authority of the United States, necessarily or properly belongs to the case. Moreover, this opinion is not only adverse to the current of opinions in the circuit and district courts of the United States, but is, I think, opposed to the opinion of the supreme court of the United States.

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I might fortify my decision by copious extracts from the opinions of Federal and State judges, but the opinion of the supreme court is so conclusive, and I shall be obliged to quote from it so extensively, that I can not, without extending this opinion to an inordinate length, make any further reference to them than has already been made. I proceed, therefore, at once to the opinion of the supreme court, rendered in cases of *Ableman v. Booth*, and *United States v. Booth*.

In the first case it appears that Booth was arrested by the United States marshal upon a warrant issued by a commissioner under the Fugitive Slave Act, charging him with the offense of aiding and abetting the escape of a fugitive slave, and that he was committed to prison. While thus held, a justice of the supreme court of Wisconsin issued a writ of *habeas corpus* directed to the marshal, requiring him to produce the body of the prisoner, with the cause of the detention. The marshal made a return that he was held by virtue of the warrant of the commissioner, a copy of which he annexed to his return.

Upon argument and a demurrer to the return, the judge held the detention to be illegal, and Booth was discharged from custody. Upon this decision the marshal sued out a *certiorari*, and removed the case to the supreme court, where, upon argument, the decision was affirmed. It proceeded upon the ground that the Fugitive Slave Act was unconstitutional, and that, consequently, the marshal had no authority to make the arrest and hold the defendant in custody.

In the second case, Booth had been indicted for the same offense with which he had previously been charged before the commissioner, been tried and convicted in the United States district court for Wisconsin, and sentenced, and was in execution upon the judgment.

Thereupon another writ of *habeas corpus* was issued

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by the supreme court sitting in bank, upon a petition setting forth, among other things, that the conviction was illegal by reason of the invalidity of the act under which he was indicted, tried, and convicted. The return of the sheriff consisted of a transcript of the proceedings, judgment, and sentence of the district court, and stated that to be the authority and process by which the prisoner was held. The court heard the argument, and decided the imprisonment to be illegal, and ordered Booth to be at once discharged, which was accordingly done. Upon both these decisions writs of error were prosecuted to the supreme court of the United States.

The court, after recapitulating the facts, state the point presented by each as follows :

“It will be seen from the foregoing statement of facts that a judge of the supreme court of the State of Wisconsin, in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner who had been committed by the commissioner for an offense against the laws of this government, and that this exercise of power by the judge was afterward sanctioned and affirmed by the supreme court of the State.

“In the second case, the State court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*, has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offense against the laws of the United States, and sentenced to imprisonment by the district court.”

The opinion proceeds: “No State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction

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of another and independent government. And although the State of Wisconsin is sovereign within its own territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offense against the laws of the State in which he was imprisoned."

The manifest import of this language is that a person held in custody under the authority of the United States is as far beyond the jurisdiction of a State court as if he were personally in a different State.

The court then, after enforcing in a masterly argument the position that the Federal judiciary has jurisdiction of all cases arising under the constitution and laws of the United States, and that this jurisdiction of all cases arising under the laws must be exclusive in order to preserve harmony, say, "We do not question the authority of State court or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and

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by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. But after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other persons holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken before a State judge or court upon a *habeas corpus* issued under State authority. No State judge or court, after they

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are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued ; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

The court do not mean that the State judge or court can proceed no further only when it is proven that the party is in custody under the *lawful* authority of the United States. If this be their meaning, surely it was not necessary to enforce the correctness of the proposition by any such labored argument as that in which they indulge, for it is undeniable that when it is shown and proven, in answer to a writ of *habeas corpus*, that a party is in custody under the *lawful* authority of the United States, the Federal judge is as powerless to proceed further as the State judge.

No judge, State or national, can, under a *habeas corpus*, discharge a party who is in lawful custody. What the court obviously mean is, that when it is shown to the State judge, by the party's own petition or by the return to the writ, that the prisoner is in custody under what purports to be the authority of the United States,—such as an enlistment of a recruit or a writ issued by a court, judge, or commissioner of the United States,—he can proceed no further. He can no more inquire whether the recruit was of age at the time of his enlistment, and subject to enlistment under

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the laws of the United States, than he can inquire whether the court, judge, or commissioner of the United States had jurisdiction to issue the writ under which the party is held. When the State judge is informed that the prisoner in whose behalf he has issued a writ is in custody *as* an enlisted soldier of the United States, or under process issued by one of their judges or commissioners, he knows "that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the exclusive jurisdiction of the United States." . . . "If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress." It is the Federal judiciary only which can release a party wrongfully imprisoned under authority of the United States; but, obviously a party wrongfully imprisoned is illegally imprisoned, and is not held under *lawful* authority; and it follows that if a State court can discharge a recruit because he was a minor, and enlisted without warrant of law,—that is, wrongfully,—it assumes the very jurisdiction which the supreme court deny to it.

"It is (say the court) the duty of the marshal, or other person holding him (prisoner) to make known, by a proper return, the authority under which he detains him;" but "it is at the same time imperatively his duty to obey the process of the United States, . . . to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty *not to take the prisoner, or suffer him to be taken before a State judge or court upon a habeas corpus issued under State authority.* No State judge or court, *after they are judicially informed that the party is imprisoned under the authority of the United States, has any*

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right to interfere with him, or to require him to be brought before them” But if a State court, after it is informed by a proper return that the party in whose behalf it has issued a writ of *habeas corpus* is imprisoned under authority of the United States, cannot require him to be brought before it, that court can make no inquiry into the actual legality of the authority ; for such an inquiry is of no value, and would be an idle ceremony without the presence of the prisoner.

The supreme court do not refer to the judgment which the State court should pronounce after hearing the whole case, when it appears that the prisoner is in *legal* custody under authority of the United States, in the strict sense of these terms. Its duty in such case is plain, and in no respect differs from that of a court of the United States. They refer to the duty of the State court to proceed no further because of its want of *jurisdiction*, and distinguish between *its* duty and that of a court of the United States, which latter court they say may discharge a prisoner “wrongfully imprisoned,” though imprisoned under authority of the United States. If the State court can inquire into the legality of a custody held under authority of the United States, and depending for its validity upon the construction or constitutionality of an act of Congress, then its judgment, though erroneous, is not void, and is as binding, until reversed by the proper court, as if it were correct, or as the judgment of any court of the United States ; and all persons who should resist such judgment would be justly liable to punishment. But the supreme court say it is the duty of a person who holds a prisoner under authority of the United States, when he makes it known to the State court that he so holds him, to resist any order of that court discharging him, and this they could not have said if, in their opinion, the State court has jurisdiction to inquire into and pronounce upon the validity of his authority.

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The term "authority of the United States," as employed by the court, obviously does not mean necessarily a "valid authority,"—that is, an authority in strict conformity to the laws of the United States,—but an authority whose validity is to be determined by those laws. It is employed in the same sense that the same term is used in section 14 of the Judiciary Act of 1789. This section, it will be remembered, provides that writs of *habeas corpus* issued by judges of the United States, shall extend to persons in custody "under authority of the United States," obviously meaning *illegal* authority, because the writ cannot be issued in behalf of one who appears to be in *lawful* custody. It is also employed in a sense similar to that in which the term "laws" is used in that clause of the constitution which declares that the judicial power of the United States shall extend to all cases arising under this constitution and the "laws" of the United States. Acts of Congress which are unconstitutional, are not, in the strict sense, *laws*, but undoubtedly the judicial power extends to cases arising under unconstitutional acts of Congress, as well as to such as arise under constitutional acts, and this is expressly affirmed by the supreme court in the opinion we have been considering. 21 *How*. 520.

What the return of the marshal or other person should contain in order to properly inform the State court that the prisoner is in custody under authority of the United States, the supreme court do not say. The court may mean that a return simply stating such fact cannot be controverted in the State court. This was, I understand, the ancient rule in all courts, and is the rule to this day in the English courts, and in the courts of the United States when the proceeding is under the act of 1789. *Hurd on Habeas Corpus*, 238-264; 2 *Hawk. P. C.* ch. 15, § 78; *Exp. Jenkins*, 2 *Wall*. 527; *Exp. Sifford*, 5 *Law Reg.* 653. Or, they may

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mean that the authority, or a copy of it, should accompany the return, when the authority exists in such shape that it can be produced,—such as an enlistment of a recruit under an act of Congress, or a process issued by a court, judge, or commissioner of the United States. But, whether they mean the one or the other, it is certain that the return made by the relator to the mayor's court of Newport conforms substantially to every requisition prescribed by them, and did, if their opinion is law, at once deprive that court of all authority and jurisdiction to proceed further. Nay, more, it then became, say the supreme court, substantially "the duty" of the relator "not to take the prisoner, nor suffer him to be taken, before the mayor's court, and if the State court attempted to control him in the custody of his prisoner it was his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of the United States against illegal interference."

Now, if it was the duty of the relator, by virtue of the laws of the United States, to retain his prisoner, notwithstanding the order of the mayor's court, then it is plain he is in confinement "for an act done in pursuance of a law of the United States," or "of the authority of the United States," as the supreme court expresses it, and must be discharged.

If the recruit was under the age of eighteen years when he was enlisted, it may be that neither this court nor any court can discharge him, if the United States shall *allege* that he was then of the legal age for recruiting, because of that provision in the act of Congress of February 13, 1862, 12 *Stat. at L.* 389, which repeals so much of the former acts as provided for the discharge of minors enlisted without the consent of their parents or guardians, and provides that "the oath of enlistment taken by the recruit shall be conclu-

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sive as to his age.”* But, if he is still under eighteen, he is not without remedy. Section 5 of the act of July

* I do not regard the act of 1862, or the act of 1864, as at all affecting the *jurisdiction* conferred by section 14 of the act of 1789 on judges of the United States to issue writs of *habeas corpus*. I think they still have the right to inquire into the cause of commitment of any one who is in custody under or by color of the authority of the United States. I regard the act of 1862 as simply furnishing a *rule of evidence*. I treat the “oath of enlistment” as nothing but evidence—conclusive evidence it is true, but still only evidence. Hence I held in *Exp. Ricketts*, that where the officer did not, and would not, in his return to a writ of *habeas corpus* issued in behalf of a recruit, allege that the recruit was of lawful age when enlisted, he should not offer the “oath of enlistment” as evidence. It is a rule of universal application, in ordinary civil actions, that one will not be allowed to offer proof respecting what he does not allege, and I think this rule may well be applied to proceedings under a *habeas corpus* when the anomalous provision of the act of 1862 is invoked.

I characterize the provision of the act of 1862 as anomalous, because it makes the “oath of enlistment,” which contains only promises respecting the future conduct of the recruit, and not *one word in regard to his age*, conclusive evidence of his age. It is quite as anomalous as if it had provided that the length of the foot of the recruit should be conclusive of his age. A provision so extraordinary, whilst it must be enforced because it is the *law* of the land, does not demand a liberal construction.

The whole provision is, “that hereafter no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age.” It is as much a part of the provision that it is unlawful to enlist one under the age of eighteen, as it is that his oath of enlistment shall be conclusive as to his age, and I think that both requisitions of the statute are best met by holding the “oath of enlistment” to be conclusive evidence *only* when it is alleged in the return that the recruit is of the legal age. When such a return has been made I have frequently held the “oath of enlistment,” whether it did or did not contain any statement of the age of the recruit, conclusive of his being of the lawful age; but, as before said, when the return contained no such allegation, I did in one case,—that is, in the case of *Ricketts*,—hear proof respecting the age of the recruit, and refuse to allow the “oath of enlistment” to be read as evidence of age at all. I am still inclined to think this opinion correct, but cannot now more fully vindicate its correctness.

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4, 1864, 13 *Stat. at L.* 380, requires the secretary of war to discharge minors who are under eighteen at the time of their application, and who are in service without the consent, either express or implied, of their parents or guardians.

Let no one apprehend that, as a consequence of this opinion, the liberty of the citizen will be seriously jeopardized. This court, and the judge thereof, will, I trust, be ever ready to hear the complaints of all persons wrongfully confined under authority or color of authority of the United States, and to give speedy relief. The communication between the judge's residence and all parts of the State where such confinement is likely to occur, is so easy and rapid that no serious delay can ensue, and if partial evil may result, it were better that this should be endured than that the

I am aware that a practice has recently grown up of sometimes swearing the recruit to his "declaration," and of sometimes inserting a statement of the age of the recruit in the "oath of enlistment," but this practice is not, so far as I know, authorized by any law, and, therefore, cannot avail for any legal purpose. There can be no oath in legal contemplation, which is not required to be taken by some law, and there is no law requiring a recruit to swear to his age.

The opinion here indicated is slightly different from those rendered by the learned judge of the Southern District of New York, in the matter of John Edward Cline, and in the matter of John Riley. The difference between my opinion in the one case above referred to, and the opinion of Judge BLATCHFORD in the matter of Cline, is of little practical importance; but I dissent from the opinion rendered in the matter of Riley, so far as it denies the jurisdiction of the Federal courts and judges in cases of this kind.

His opinion is founded on the assumption that section 1 of the act of 1814, 3 *Stat. at L.* 146, is still in force. I think the assumption unfounded. The act of 1814 was a war statute, and section 1 was, I think, superseded as early as 1815, that is, by section 7 of March 3, 1815 entitled, "An act fixing the military peace establishment of the United States." 3 *Stat. at L.* 224. Section 1 of the act of 1814 has been assumed to be repealed in numerous judicial decisions, and by the war department in all the "Army Regulations." B.

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peace of society should be disturbed by any attempt of State tribunals to interfere with the proper jurisdiction of the national courts, or with officers acting in the line of their duty under the authority of the United States.

Let the relator be discharged.

WOODMAN v. THE KILBOURN MANUFACTURING COMPANY.

Circuit Court, Seventh Circuit ; District of Wisconsin, January T., 1867.

ORDINANCE OF 1787.—POWER OF CONGRESS TO REGULATE COMMERCE.—NAVIGABLE STREAMS.

The ordinance of 1787, for the government of the Northwest Territory, has been superseded by the adoption of the Constitution of the United States, and the admission to the Union of the States formed from that Territory ; and the provision of the ordinance declaring the navigable waters leading into the Mississippi and the Saint Lawrence "common highways and forever free," does not restrict the powers of Congress, or of the States, to legislate respecting those waters.

In the absence of any conflicting enactment by Congress relative to the use of a navigable stream, the State within which such stream lies has power to legislate respecting it.

The right of the public to use a navigable river as a highway, is paramount to every other use of the water ; but it does not exclude or forbid the legislature of the State (where no conflicting enactment by Congress exists) from authorizing the construction of public improvements upon the stream, although they may involve a partial obstruction or inconsiderable detention to navigation.

Under the constitution and laws of Wisconsin, any obstruction to the

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use of a navigable stream by the public for purposes of navigation, which is erected without a constitutional legislative authority, is a nuisance, and liable to be abated either at the suit of an individual or at the instance of the State.

Motion for a preliminary injunction.

George W. Lakin and Israel Holmes, for the motion.

Finckes, Lynde, & Miller, opposed.

MILLER, J.—It is alleged and charged in the bill, that the Wisconsin is one of the navigable rivers leading into the Mississippi river, and a common highway, free to be navigated and used as such highway by complainant and all other citizens of the United States. That said river is navigable from its source to its mouth, and capable of being used for rafting and for driving lumber, and also for steamboat navigation; and that it runs through a district of pine lands lying above the town of Newport. That the owners of said lands, including complainant, annually raft down said river large quantities of lumber and logs to saw mills and to market; and that they are dependent upon the unobstructed use of the river in this employment. The bill further charges, that in 1859 a dam was constructed in said river at the town of Newport, by a chartered company, for hydraulic purposes, which, being an obstruction to navigation, was partly removed. And that the company defendant are building a dam at the same place, using a portion of the old dam; and that this company are doing so under color or in pursuance of an act of the State legislature, entitled “An act to aid in the development of manufacturing interests in this State,” approved April 10, 1866, as follows: “The Kilbourn Manufacturing Company, whenever organized in pursuance of any law in this State, shall have power,

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and said company is hereby authorized to complete the water power in sections three, four, nine, and ten in township thirteen north, of range six east, in the counties of Columbia and Sauk, by raising the dam sufficient height for that purpose, not exceeding three feet above the usual low water mark in the Wisconsin river, and so forming the same that rafts of lumber can pass safely and conveniently, without hindrance or delay." The bill then charges that it is physically impossible to build a dam at that point, the town of Newport, in such form as that rafts of lumber can pass safely or conveniently, or without hindrance or delay; and that such dam would wholly obstruct the navigation of the river by steamboats and other vessels; and will entirely obstruct navigation up stream; and that the structure, as at present towards completion, has obstructed free passage to rafts, and caused to the owners thereof delay and damage. It is further charged, that the act authorizing the construction of the dam is contrary to the ordinance of 1787, the constitution and laws of the United States, and of this State.

Defendants Anderson and Kilbourn are alleged to be agents of the company defendant in the work of building the dam.

The bill prays an injunction restraining defendants from further proceeding in the building of the dam; and that at the final hearing the dam may be decreed to be abated as a common nuisance.

Affidavits read on the part of complainant sustain the charges in the bill in regard to the obstruction of navigation by the proposed dam. Those on the part of defendants state that the dam will be an improvement to navigation at that point. It does not satisfactorily appear that the river above the site of the dam is navigable for steamboats employed in the ordinary business of commerce. It is conceded that rafts of logs

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and lumber can be floated down stream from several miles above the dam.

The ordinance of the Confederate Congress, for the government of the territory of the United States northwest of the river Ohio, adopted July 14, 1787, created a temporary government ; and also contained six articles, "to be considered as articles of compact between the original States and the people and States in said territory, and forever remain unalterable, unless by common consent." After the adoption of the constitution of the United States, an act of Congress, passed August 7, 1789, 1 *Stat. at L.* 50, continued the ordinance in force, and modified it in conformity to the conditions of the constitution, so far as it related to the temporary government of the territory.

That portion of the ordinance referred to in the bill is, "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor." The constitution of the United States, subsequently adopted, contains the provision that "new States may be admitted by the Congress into this Union," which implies that new States shall be admitted into the Union on an equality with the original States. The ordinance directs that the territory may be divided into not less than three nor more than five States ; but the territory has been divided into six States, including that portion of Minnesota east of the Mississippi river. The ordinance further directs, that in case of a division into five States, one boundary shall be an east and west line drawn through the southerly bend or extreme of Lake Michigan, which we knew to have been entirely disregarded by Congress in the acts admitting new States.

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If the ordinance were obligatory in every particular, and not altered by common consent, nor superseded by the constitution of the United States, the States embraced within the northwestern territory could not have been admitted into the Union on an equality with the other States, which is a fundamental principle of the constitution, the basis of this Union. Each new State presented its constitution to the consideration of Congress, with its application for admission into the Union under the Federal constitution ; Congress, composed of members from the original States, approved the constitution of the new State thus presented, and passed an act for its admission into the Union. By the act of Congress admitting the new State upon its application, the several articles of the compact were not merely altered by the common consent required in the ordinance, but were superseded. "Whatever may have been the force accorded to the ordinance at the period of its enactment, its authority and effect ceased, and yielded to the paramount authority of the constitution of the United States from the time of its adoption." *Pollard v. Hagan*, 3 *How.* 212 ; *Parmalee v. First Municipality of New Orleans*, *Id.* 589 ; *Strader v. Graham*, 10 *Id.* 82 ; *Dred Scott v. Sandford*, 19 *Id.* 393, 490-492. It therefore follows that the act of the legislature authorizing the construction of the dam in question is not prohibited by the ordinance.

The general government, under the constitutional power of Congress "to regulate commerce among the several States," has done no act prohibiting or interfering with this State in regulating the navigation of the Wisconsin river. No act of Congress has been passed upon the subject of commerce on that river, which includes the navigation. Nor have boats or vessels been licensed, nor ports of entry established on said river by Federal authority. The Wisconsin river being a domestic stream, rising, running, and emptying into

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the Mississippi river within the State, local legislation is unrestricted by Federal authority, unless it is in conflict with the navigation laws, or some other enactments of Congress. In the absence of action on the part of the United States in regard to the navigation of the river, as a stream bearing a necessary relation to commerce among the several States, the power of the legislature, under the State constitution, to pass the act authorizing the construction of the dam in question, is the next subject for consideration.

The Wisconsin river is a meandered stream according to the government survey of public lands. Although it is not navigable in its unimproved condition above the site of the dam for steamboats navigating the Mississippi river, yet it is navigable in the common sense of the term. The soil or bed of the river is not granted to riparian purchasers *usque ad filum*, but the body of the stream is reserved to the public. The river is therefore open and free to all persons for purposes of navigation ; not a personal right, but subject to governmental authority. The right to unobstructed navigation of the river is to be regarded as a clear and undoubted right, paramount to every other use of the water. It is an inherent paramount right of the people, but not exclusive of a partial obstruction or considerable detention by a dam constructed in pursuance of governmental authority for the development of the country, for the accommodation of public necessities, or of commerce, or travel upon the land. Partial diminution of the navigability of a stream for these purposes, unless restrained by the superior legislation or authority of the general government, has been within the established power of the States since the formation of the government. In the case of *Wilson v. Blackbird Creek Marsh Co.*, 2 *Pet.* 245, it appears that the creek was a navigable stream flowing into the Delaware river ; and that the legislature of the State of Delaware

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passed an act empowering the company to build a dam in said creek for the purpose of excluding the water from the surrounding marsh, and thereby enhancing the value of the property on its banks and probably improving the health of the inhabitants. The dam was a total obstruction of navigation. The court decided that the measure authorized by the act stops a navigable stream, and must be supposed to abridge the rights of those accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of the State of Delaware and its citizens. In *Martin v. Waddle*, 16 *Pet.* 410, the court say: "When the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all the navigable waters and the soil under them for their own common use, subject only to the rights surrendered by the constitution of the general government." The admission of the new States into the Union on an equality with the original States gives them the same absolute rights, notwithstanding the title to the soil was originally in the United States. *Pollard v. Hagan*, 3 *How.* 212. See also *Gibbons v. Ogden*, 9 *Wheat.* 1; *Pennsylvania v. Wheeling Bridge Co.*, 13 *How.* 519; and 18 *Id.* 421, 430, 432; *Gilman v. Philadelphia*, 3 *Wall.* 713; and the opinion of GRIER, J., in the *Passaic Bridge Case*, *Id.* 782.

It cannot be claimed that the complainant, a citizen of the State of Massachusetts, has a right to the navigation or use of the Wisconsin river superior to that of the inhabitants of the State. By the Federal constitution "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States."

It is claimed, on the part of the complainant, that the act authorizing the construction of the dam in

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question is repugnant to the provision in article IX. of the State constitution, that "the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the State as to the citizens of the United States, without any tax, impost, or duty therefor." This article was incorporated into the constitution from the ordinance of 1787. The navigable waters, such as the Wisconsin river, running into the Mississippi river, shall be common highways, and their navigation, to the extent of their navigable capacity, cannot be materially obstructed. Such rivers may be considered navigable waters without any such constitutional provision, as Congress has the power to regulate commerce between the States, which includes the navigation of navigable streams. The paramount right of navigation being in the people who may wish to use a navigable stream, any obstruction, however inconsiderable, without constitutional legislative authority, is a nuisance, to be abated at the suit of an individual or of the State.

This principle is prescribed in a general law of the State, "that all rivers and streams of water in this State, in all places where the same have been meandered and returned as navigable by the surveyors employed by the United States government, be declared navigable to such an extent that no dam, bridge, or other obstruction may be made in or over the same without the permission of the legislature." This law establishes by statute the inherent common law right of the legislature to investigate and ascertain the extent of the navigability of streams, and of the kind of proposed partial obstructions to navigation, for the general convenience and use of the people. In the case of the Blackbird creek, in the State of Delaware, navigation was totally obstructed by the dam built in pursuance of a legislative act; but whether such an obstruction

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could be built in one of the navigable streams of Wisconsin, this case does not require a decision. It is very clear that neither in Delaware nor in Wisconsin can even a partial obstruction be made without governmental authority. The legislature has the power to inquire into the necessity for a structure, such as a bridge or dam, over or in a navigable stream, and to prescribe the conditions and plans upon which the proposed improvement may be made. It is also the province of the legislature to inquire into the navigability of a stream and the uses to which surplus waters may be applied. The navigability of the stream is the subject of proof. The return of the surveyors, showing a stream to have been meandered, is not conclusive. *Jones v. Pettibone*, 2 *Wis.* 308. That case announced the principle that the effect of the statute is not to declare that meandered streams are navigable in fact, so as to dispense with proof of their navigability, when the fact is to be established, but only that they shall be regarded as navigable to such an extent that no obstruction shall be placed in them without the consent of the legislature. The statute declares that the legislature possesses the exclusive power to direct and control the municipal policy of the State in regard to improvements and partial obstructions of navigable streams. The constitutional provision is a declaration of a principle inherent in a sovereign State of the Union, and the statute is notice of such power.

It is not for an individual, but for the State to decide whether the whole of a public highway is necessary for the public accommodation or not; hence any partial obstruction of any navigable stream or highway, or any portion of it, without legislative authority, is a nuisance. The public have a right to the use of the entire highway; and no citizen can appropriate a portion, upon the principle that enough remains for public use. The legislature is no judge of that. The act authorizing

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the construction of the dam in question is in the nature of a public grant of the use of surplus water of the river for the improvement and development of the country, and for the accommodation of the people in the vicinity. In making this grant, the legislature probably were influenced by the consideration that the man who builds a mill or manufactory in a new country is a public benefactor. See *People v. City of Saint Louis*, 5 *Gilm.* 351 ; *Hart v. Mayor of Albany*, 9 *Wend.* 571 ; *Bay Harbor v. City of Monroe*, *Wilkins Ch.* 155 ; *Flanigan v. City of Philadelphia*, 6 *Wright*, 218. Several acts have been passed by the State legislature, from time to time, authorizing the construction of dams in meandered rivers, upon such plans, or in such forms, that rafts of lumber can pass safely and conveniently, without hindrance or delay. Such acts were also passed by the territorial legislature while the ordinance was considered in force in the territory. I have come to the conclusion that the act authorizing the construction of the dam in question is within the constitutional power of the legislature.

The bill complains of a prospective abridgment of complainant's right to the free navigation of the river. He has not been injured by the dam at present in process of construction. Defendants must be allowed a reasonable time to construct the dam, not exceeding three feet in height above low water mark, and in such form as rafts of lumber can pass safely and conveniently without hindrance or delay, according to the act. The work cannot be restrained by injunction, upon the theory that no dam can be constructed at that point that will not obstruct the navigable use of the river. The legislature have authorized defendants to make the experiment, if a dam can be constructed as required by the act, and the court will permit the practical test to be applied. If the speculations of complainant's bill should be realized, and defendant's

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efforts prove unsuccessful, the dam will have to be abated at their costs. Mere theoretical opinions are not sufficient in law for enjoining the progress of a work in the nature of a public improvement authorized by a legislative act.

If a dam shall be constructed according to the requirements of the act, the paramount right of those navigating the river with rafts of lumber is satisfied. They cannot complain if the dam should detain their rafts a few minutes, or should require caution in passing through or over it. The only question on final hearing will be whether the dam not exceeding three feet above the low water mark is so constructed that, with proper care and caution, "rafts of lumber can pass safely and conveniently without hindrance or delay." Since the year 1838 a dam with a lock for ascending and descending trade has stood in the Fox river, at Depere, in this State. The time required for passing the lock is no hindrance or delay. In the year 1840 a bill was brought before me, as territorial judge, to restrain the erection of a bridge over the Milwaukee river at Milwaukee, which is at that place an arm of the lake, navigable for all classes of boats and vessels. Being satisfied that the bridge was to be built with a draw, which could be opened or closed in fifteen or twenty minutes, I considered that the interests of commerce must submit to an inconsiderable delay or inconvenience for the accommodation and necessity of the people, and dismissed the bill. Since that day bridges with draws have been constructed, in pursuance of legislative acts, over almost every river in the land. Dams, too, are built by the same authority in navigable streams, with locks or sluices, for the accommodation of the whole people.

The injunction prayed for is refused.

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CUYLER v. FERRILL.

Circuit Court, Fifth Circuit; Southern District of Georgia, October T., 1867.

PAYMENT IN CONFEDERATE NOTES.—JURISDICTION.

The definition of a vested remainder given in *Doe d. Poor v. Considine*, 6 Wall. 458,—viz: “a vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in future,”—approved and applied.

A payment of purchase money made in “Confederate notes,” although made while the civil war of 1861–’65 was still pending, and in one of the so-called Confederate States, where such notes were then the usual currency, and although the notes were accepted as money, can not constitute the party making the payment a *bona fide* purchaser for value, so as to entitle him to equitable protection or relief in the circuit court.

Where a purchaser has notice of the facts upon which an adverse claim depends, he is deemed to have notice of the consequences of those facts.

The courts of the United States will take judicial notice of the existence of the civil war of 1861–’65; and of the facts of public history connected with its origin and progress.

During the civil war of 1861–’65, some of the devisees of lands lying in Georgia, commenced proceedings for a partition of the lands, in one of the courts of Georgia. A partition was ordered and a sale made. At the time when the proceedings were pending one of the devisees was in the discharge of his duties as a surgeon in the United States army; and was prevented from communication with the State of Georgia, by the war. *Held*, that the proceedings of the Georgia court were void, as against such devisee, for want of jurisdiction.

The rule asserted by some authorities, that a bill in equity for partition should be dismissed where the title is denied, or an adverse possession asserted, and the parties left to establish their rights at law,—questioned.

Hearing in equity, upon pleadings and proofs.

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Messrs. *Fitch* and *Pope*, for complainant.

Messrs. *Dougherty* and *Lloyd*, for defendants.

ERSKINE, J.—John M. Cuyler, a citizen of the State of Pennsylvania, filed his bill in chancery in this court, for partition and relief, against D. M. Hood, and Frances, his wife ; Joel Branham, and Georgia C., his wife ; Estelle Cuyler, a minor, all citizens of Georgia, and residents of the northern district ; and John C. Ferrill, of the city of Savannah, and a citizen of the State of Georgia.

The bill was demurred to, because it was not alleged that any one of the defendants resides in the southern district, and because the forty-first Rule of Practice was not complied with.

The demurrer was argued and overruled.

The cause of complaint finds its origin in the following provision in the will of Jeremiah Cuyler, deceased, made in 1837: "I give and bequeath my two lots and buildings in Savannah, fronting on Broughton and Bull-streets, to my four daughters" [naming them] "for and during their natural lives, and thereafter I give said two lots to my sons, John M. Cuyler and Teleman Cuyler, their heirs and assigns."

Complainant alleges that the life estate ceased in March, 1863, by the death of the last surviving daughter, and that the property, by the terms of the will, vested, in fee, in John M. Cuyler, and in the heirs of his brother Teleman, in undivided halves ; Teleman having died, intestate, anterior to the termination of the life estate. He left a widow, Frances, who intermarried with defendant Hood, and left also three children—Thomas, who resides in Alabama ; Georgia C., who had intermarried with defendant Branham, and Estelle, a minor.

Complainant also alleges that he has been informed

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that sometime during the late civil war, and when all communication was interrupted, and when he was in the discharge of his duties as surgeon in the army of the United States, some of said parties applied for a partition of said property, and under proceedings of which he knew nothing, to which he was not a party, and of which, at the time of filing the bill, he had no definite information, the said property was sold and purchased by John C. Ferrill, aforesaid, who, as he has been informed, paid for the same in notes issued by the late Confederate government. He charges that if such proceedings were had, they were not binding on him ; and if intended to affect his rights, they were a fraud upon the same, and unlawful. He prays for a commission to divide and allot the property, so that he may hold a moiety thereof in severalty, and for an account of the rents, income, and profits from the death of the last surviving daughter, on the — day of March, 1863.

Branham and wife, and Estelle Cuyler, by Hood, as her *prochein ami*, in answering the bill, admit, in general terms, the allegations therein. They further state that, soon after the vesting of the fee in complainant and the heirs of Teleman, Hood and his wife released to the remaining heirs all their interest in the property, "after which said property was held by such heirs and the complainant." That Branham, as trustee under a marriage settlement with his wife Georgia C., "applied to the superior court of Chatham county, for partition and sale of said property ;" a sale being necessary, because of the impracticability of dividing it by metes and bounds. That on May 16, 1863, the Hon. W. B. FLEMING, Judge, &c., granted the prayer of the petitioners, appointed commissioners to conduct the sale ; and the property, after being advertised in two newspapers in the city of Savannah for thirty days, was sold under the direction of the commissioners, at public outcry, on

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the first Tuesday in July, 1863, to John C. Ferrill, for thirty-six thousand dollars ; to whom, on August 14 of the same year, they made a deed of conveyance of the entire property. They admit that they severally received their distributive shares of the proceeds of the sale in treasury notes of the Confederate States, and believe that the whole of the purchase money was paid by Ferrill to the commissioners in the same kind of currency ; and at that time such was the currency of that part of the country. They add that they acted in perfect good faith, and are content, so far as their interest is concerned, to stand by such proceedings, and abide by the results.

On June 1, 1864, the commissioners made a return to the court, of their acts and doings in the premises ; which may be stated thus : twelve hundred and forty-three dollars and thirty cents for expenses ; five thousand eight hundred and seven dollars and eighty-three cents paid to Branham as trustee ; the same sum to John R. Freeman, guardian of Thomas H. Cuyler ; and the like sum to Ross, guardian of Estelle Cuyler ; leaving seventeen thousand three hundred and thirty-three dollars and one cent, "which," they add, "under the will of the said Jeremiah Cuyler, is devised to Dr. John M. Cuyler, a surgeon in the army of the United States. Of this amount these commissioners, under the exigencies of the currency act of the Confederate States, have invested seventeen thousand dollars in five per cent. certificates, and have on hand thirty-three dollars and one cent, currency of the Confederate States, issued prior to February 17, 1864." This return is included in the record of the proceedings for partition, all of which is made a part of the answer of these defendants.

John C. Ferrill in his answer admits the relationship of the complainant to the testator ; but avers that he knows nothing of the will, the devises therein, or the

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probate thereof, or of the enjoyment of the property by the daughters of the testator, or of the vesting of the same in complainant and the heirs of Teleman ; or of the residence of Thomas M. Cuyler ; and prays strict proof. He substantially, but briefly, states the proceedings for partition ; admits the sale of the property and its purchase by himself in 1863, and payment of the purchase money (thirty-six thousand dollars) in a check on the Bank of Commerce, and the receipt of the deed of conveyance from the commissioners. He avers that he believes that complainant was, at the time of the sale, a surgeon in the United States army ; but knows not whether he was ignorant of the proceedings, and requires strict proof. He utterly denies any fraud on the rights of complainant in the sale and purchase of the lots aforesaid, "and insists that as a fair and *bona fide* purchaser for a valuable consideration he hath a full title to said lots of land in fee simple, and that partition cannot be decreed by this court." To these several answers complainant filed his replications.

Before inquiring into the merits of this cause, it may be well to advert to the deed of conveyance of August 14, 1863. The commissioners briefly set forth the proceedings for partition. Then comes this recital : "And whereas the said John M. Cuyler, being resident of the United States of America, the country of an alien enemy, has failed to execute a title to the said John C. Ferrill, the purchaser as aforesaid, and it hath become by law the duty of the aforesaid commissioners, or any two of them, to make and execute to the purchaser at such sale a deed of conveyance of said lots of land," &c. This is followed by a deed of bargain and sale to John C. Ferrill in fee, executed by the three commissioners. George W. Wylly, one of the commissioners, testifies that Ferrill paid for the property in "Confederate notes ;" does not know whether he ever got pos-

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session of the property further than the delivery of the deed to him ; and that it is generally known as Ferrill's property. As already seen by the condensed view presented of the record in this cause, the premises sought to be partitioned were devised by Jeremiah Cuyler to his four daughters for life, remainder to his sons, John M. and Teleman, in fee. This devise, on the death of the testator, gave the sons a present fixed interest in the property as tenants in common ; and on the falling in of the last of the precedent life estates, in March, 1863, the seizin and implied actual possession and immediate enjoyment of the property was cast upon John M. and the heirs of Teleman, in undivided moieties.

Said Mr. Justice SWAYNE, in pronouncing the decision of the supreme court of the United States in Doe, Lessee of Poor v. Considine, 6 Wall. 458 : " A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed *in futuro*." Guided by this comprehensive definition, it is plain that the devise in the will of Jeremiah Cuyler is a vested and not a contingent remainder ; and that the undivided half of the devised property is still in the complainant, unless he has disposed of it by alienation, or has been dispossessed of his title to and in it by the decree or judgment of a court having jurisdiction of the subject-matter and the rights of complainant.

The proceedings relied upon by the contesting defendant, Ferrill, in bar of the present suit for partition, were had, as it seems, under the Code of Georgia, sections 3,896 to 3,907, inclusive. These sections provide, among other things here unnecessary to mention, that if the party called upon to answer the application for partition be absent from the State, or has not been notified, he must, within twelve months after the rendition of the judgment, move the court to set it aside, or he will be concluded. " But in no event shall subsequent

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proceedings affect the title of a *bona fide* purchaser under a sale ordered by the court." Code, § 3,907.

The property, as already noted, was sold in the summer of 1863, and the bill was filed in this court in the winter of 1867, nearly four years thereafter. But from the view which I entertain of this suit, the statute of limitations invoked is not a point for decision.

Among other defenses, Ferrill assumed the position that if there was any irregularity in the proceedings of 1863, complainant must address himself to the superior court of Chatham county, that court alone having jurisdiction of the matter under the statutes of Georgia. And that view must be deemed correct unless there be circumstances—circumstances peculiar to the alleged proceedings for the partition—which contravene some governing principle or policy of the common or positive law.

Another position taken by him was that he is a fair and *bona fide* purchaser for value of the entire property, at a judicial sale, and, therefore, that no partition can be made by this court.

If this argument is sound, then the complainant must go elsewhere to seek redress ; for this court has no jurisdiction except what is bestowed by the national constitution, and the laws of Congress enacted in pursuance thereof. This defense appears to be founded upon the concluding sentence of section 3,907 of the Code, but the defense is not, in my judgment, proved by the evidence. To entitle Ferrill to the benefit of it (supposing the proceedings and sale to have been legal), the purchase money—the thirty-six thousand dollars—must have been paid in money ; whereas the proof is that it was paid in "Confederate notes." *Boone v. Chiles*, 10 *Pet.* 177.

Here it may be observed that it was fully discussed at the hearing whether the defense of *bona fide* purchaser can avail against a legal title ; but the question

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seems not to be material to the determination of this cause.

If Ferrill is to be treated as a purchaser, it must be in a very limited sense of the term ; he cannot be recognized as a purchaser who has paid, but as one still indebted ; as, for example, a defendant in *feri facias* would be, after payment to the marshal in a worthless or depreciated currency. *Griffin v. Thompson*, 2 *How.* 244 ; *Buckhannon v. Tinnin*, *Id.* 258. See, also, 3 *Id.* 707. Therefore, if the court could abstain from making partition, it would do so on terms, and these terms will necessarily be that Ferrill, as purchaser, pay to complainant his share, being one-half of the purchase money, in legal tender notes, with interest. And even if the court should ultimately so decree, it would not go so far as to accept such performance in lieu of partition, until after a return of the commissioners of this court, and not then, unless by mutual consent of the parties ; or, as the last resort, in case equity cannot otherwise be done.

Notwithstanding the contentment of those defendants who received and accepted payment of their respective shares in Confederate currency or notes from their co-defendant Ferrill, under the authority and direction of their freely chosen agent, still my mind fails to comprehend the process of reasoning by which it can be inferred, from such receipt and acceptance, that the rights of the complainant in this bill are in any wise affected, unless he was a party to the transaction, or the tribunal which rendered the judgment had judicial cognizance of the cause.

This court, in *Williamson v. Richardson*, April term, 1867, and the United States district court for the northern district of Georgia, in *Dean v. Harvey*, Administrator of Youal, in chancery, July, 1867, and the same court in *Bailey v. Milner*, published in the *Appendix to 35 Ga.* (2 *Bleckley*) 330, ruled, that where

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parties, inhabitants of this State, had, during the rebellion, sold or otherwise disposed of their property for Confederate notes, and accepted them in payment or exchange for it—where such transaction was fully executed, and free from fraud, covin, misrepresentation, and undue influence—the United States courts for the State of Georgia would not, unless otherwise instructed by the supreme court of the nation, lend their aid to disturb or to set aside those acts, but would suffer them to remain entombed, and would leave also the parties to repose where they had voluntarily placed themselves. *Tolber v. Armstrong*, 4 *Wash. C. Ct.* 296 ; *Planche v. Fletcher*, 1 *Dougl.* 251 ; *Bonch v. Samson*, *Cas. Temp. Hardwicke*, Lond. ed. 85, 89, 184. The owner of property may dispose of it for what he pleases, or even give it away. But this court can not recognize Confederate notes, or, as they are more commonly called, “Confederate treasury notes,” as money or other thing of value. And in *Bailey v. Milner*, *supra*, it was said by the court that these notes were issued by a pretended government, organized in the name of certain States by subjects and citizens of the United States, and who, at the very time, were in rebellion against their rightful government, and whose object and design it was to dismember and destroy it. See, also, *Prize Cases*, 2 *Black*, 635 ; *Shortridge v. Macon*, Opin. of CHASE, Ch. J.*

Ferrill has made the record of proceedings of 1863, and also the deed of conveyance, a part of his answer ; and having adopted this mode of defense, he is bound by it, for he cannot contradict that which he has pleaded as a record, nor gainsay the conveyance or the recitals therein ; and each shows that he had notice of the claim of complainant to a moiety of the property. *Bowman v. Taylor*, *Scott*, 210 ; *Van Rensselaer v.*

* Reported *ante*, 58.

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Kearney, 11 *How.* 297 ; Brush v. Ware, 15 *Pet.* 93. Where a party has knowledge of the facts, he has notice of the legal consequence resulting from those facts.

In the argument in behalf of Ferrill it was said by one of his counsel, Mr. *Dougherty*,—and I quote from his brief,—that “the superior court of Chatham county had jurisdiction of the subject matter, and of the parties in interest, and its judgment, although (even if) erroneous, cannot be attacked collaterally.” Citing and commenting on *Griffith v. Frazier*, 8 *Cranch*, 9 ; 1 *Pick.* 439 ; 2 *Burr.* 1009 ; 2 *H. Black*, 415 ; 1 *Kelly*, 487 ; 23 *Ga.* 186.

If the tribunal which entertained the proceedings for partition really possessed the powers ascribed to it by counsel, then the authorities quoted are apposite, and the judgment cannot be assailed collaterally. But if it had not such jurisdiction, then the judgment, so far, at least, as the rights of the complainant are involved (for I am not called on to notice any jurisdictional question which might, under other circumstances, affect those who applied for partition in 1863), is null and void. And here the inquiry necessarily arises, Had this court jurisdiction of the subject matter of the judgment ?

The national legal tribunals take judicial notice of the general enactments of Congress, and of the duly promulgated proclamations of the president. The late civil war being matter of public history,—a fact impressed upon the whole country,—is likewise judicially known to the courts ; and from this general historical fact they will also take judicial notice of particular acts which led to it, or happened during its continuance, whenever it becomes essential to the ends of justice to do so. On April 19, 1861, proclamation of blockade was made by the president. This of itself was conclusive evidence that a state of war existed. Prize Cases, 2 *Black*, 635. Congress, on July 13, in the same

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year, passed a law authorizing the president to interdict all trade and intercourse between the citizens of the States in rebellion and the rest of the United States. On August 16 following, he proclaimed the inhabitants of the revolted States, including Georgia, in insurrection; excepting, however, certain named localities. And on April 2, 1863, he proclaimed them in insurrection, revoking the previous exceptions, but again making others. No part of Georgia fell within any of the exceptions. Congress, by a joint resolution, on February 8, 1865, declared that the inhabitants and local authorities of Georgia and ten other States "rebelled against the government of the United States, and were in such condition on November 8, 1864." 12 *Stat. at L.* 1262, 257; 13 *Id.* 731, 567.

In *Bailey v. Milner*, *supra*, the court said: "During the latter part of the year 1860 and the early part of 1861, South Carolina, Georgia, Louisiana, Virginia, and other States, by similar modes called on the people to send delegates to meet in convention. Accordingly the conventions assembled, and each passed an 'ordinance of secession,' as it is generally termed, by which ceremony these conventions severally adventured to withdraw the States from the Federal Union, and to release the people from their subjection to the laws of the land and their allegiance to the nation. The constitutional State governments were overthrown, and superseded by spurious and revolutionary governments. The setting up of a pretended central or general government, styled 'The Confederate States of America,' followed, and soon thereafter open rebellion and war of portentous magnitude burst upon the nation." *Prize Cases*; *Shortridge v. Macon*, *supra*.

"In the seceded States (so-called), the sovereign authority being, for the time, displaced, consequently there ceased to be, within any of them, a government under the Constitution of the United States." *Vide* 1

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Bishop Crim. Law, 3 ed. § 129, and *Mauran v. Insurance Co.*, 6 *Wall.* 1.

In 1863 and 1864, the complainant was in the discharge of his duties as a surgeon in the national army ; and whether he had knowledge of the pendency of the alleged proceedings for partition is a matter quite immaterial. He, however, in his bill, avers that he knew nothing of them ; but admits that he had some indefinite information that the property was sold, and was purchased by John C. Ferrill, and was paid for in Confederate notes. But suppose notice—actual or constructive—came to him ; still he could not be charged with laches, for, had he responded, it would have been *ipso facto* a breach of his allegiance to the United States. *Hanger v. Abbott*, 6 *Wall.* 532. And in that case Mr. Justice CLIFFORD, in giving the opinion of the court, said : “ War, when duly declared, or recognized as such by the war-making power, imports a prohibition to the subjects or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy’s country.”

In a subsequent part of the same opinion, that eminent judge—while remarking on the temporary cessation of common law and statutory limitations during war—used the following language : “ But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a State may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts and to successfully resist the laws, until the bar of the statute of limitations becomes complete, which cannot for a moment be admitted.”

The last quotation forcibly illustrates the maxim, that no one ought to be allowed to take advantage of

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his own wrong ; a maxim applicable to the case now before this court ; not so much, however, in a positive as in a circumstantial sense ; yet falling within the principle, that no one shall entitle himself to enforce a defense by reason of acts adopted or acquiesced in by him, after full knowledge of their nature and legal ulterior consequences.

If Mr. Ferrill were a *bona fide* purchaser, who purchased and paid his money for the property, confiding in the judgment of a tribunal of competent jurisdiction, then this court would decline to take cognizance of this suit—notwithstanding irregularities in the original proceedings—if the tribunal which assumed to entertain them had jurisdiction of the subject matter and of the rights of the complainant in this bill.

But my conclusion is, that the proceedings for partition, by the pretended superior court of Chatham county, in 1863 and 1864, so far as the rights of the complainant are concerned, were utterly void. And the court decrees accordingly.

In this cause the complainant is endeavoring to establish his legal title to a moiety of the property, and in doing so he has not in his bill charged the defendants with any fraudulent intent upon his rights.

The main question being adjudged adversely to John C. Ferrill, still it seems to be necessary to notice another matter which was pressed with great earnestness. It was said on the part of Ferrill that adverse possession is a bar to a proceeding for partition, both in equity and at law. “If,” said the counsel, “the bill states an adverse possession, it should be dismissed without prejudice.” Citing 2 *Barb. Ch.* 398 ; 3 *Id.* 608 ; 4 *Id.* 493 ; 5 *Id.* 51 ; 9 *Id.* 516 ; *Hoff.* 560 ; 1 *Johns. Ch.* 111 ; 9 *Cow.* 516, 573, and *Richd. Eq.* 84. These authorities uphold the doctrine contended for.

In addition to those authorities, counsel also relied on the case of *Bishop of Ely v. Kenrick*, *Bunb.* 322.

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There the bill for partition was dismissed, because the title was *denied*. Without questioning the law of that decision, it must be deemed somewhat novel; for by it every defendant in a suit for partition, who chooses to deny title, holds the complainant at his mercy.

Courts, as eminent for their decisions as those referred to in argument, have of late progressed beyond this ancient technical rule of chancery practice. In *Howy v. Goings*, 13 *Ill.* 95, Mr. Justice TRUMBULL, in delivering the opinion of the supreme court of the State of Illinois, said: "There can be no doubt, however, that a bill in chancery lies for partition, notwithstanding an adverse possession, unless it has been continued sufficiently long to bar a recovery under the statute of limitations, which is not pretended in this case." He cites *Overton v. Woodfolk*, 6 *Dana*, 374. I carefully looked into the bill in the present case, and found no allegation of adverse possession, nor is it set up in the answer or proved by the evidence.

It is said that in a bill for partition the averment of possession is not sufficient; there must be an averment of title. 2 *Atk.* 882; *Amb.* 236. And the reason of this rule is plain; for it is upon the title that courts of equity act in decreeing partition; and to render the title of each party complete, they compel the parties, when the several portions are allotted, to execute conveyances according to the partition; and the execution of these titles draws to them the possession. If there is no relaxation of the rule which obtained in the English chancery and in the chancery courts of several of the older States of the Union, then where a bill is filed for partition, and an adverse possession is interposed, or where the legal title is disputed, or suspicious circumstances darken it, it is usual for the court to make a decretal order arresting the proceedings until the parties disputant settle the title in a court of law. 1 *Ves. & B.* 552; 3 *Johns. Ch.* 303; 4 *Id.* 276. But in some

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of the States, owing in part, at least, to the peculiar manner in which the tribunals of justice are there constituted, by the blending of the offices of chancellor and common law judge in the same person, the rigid chancery doctrine has been greatly modified. In Georgia, for example, these offices, distinguishable in some degree in a judicial sense, are exercised by the same person. And such, indeed, is likewise the case in this court. See Act of September 24, 1789, § 11, 1 *Stat. at L.* 78. The supreme court of the United States, in *Parker v. Kane*, 22 *How.* 1, speaking of chancery practice in suits for partition, said, "In Great Britain, a chancellor might have considered this a case in which to take the opinion of a court of law, or to stay proceedings in the partition and cross suits until an action at law had been tried to determine the legal title. *Rochester v. Lee*, 1 *McNaught. & G.* 467; *Clapp v. Bronaghan*, 9 *Cow.* 530. But such a proceeding could not be expected in a State where the powers of courts of law and equity are exercised by the same persons." But in my opinion this case has not thus far presented any question of fact upon which an issue could be framed for the determination of a jury. The evidence in the cause is unassailed, uncontradicted, and in no way conflicting. John C. Ferrill, the contesting defendant, stands upon the record of the proceedings of 1863 and 1864; and if it be tried it must be by inspection, and this is the province of the court.

Indeed, the most that can be said against complainant's title is that it is not free from doubt; but all the doubt there is concerning it is raised by the sale under a pretended judgment of partition; and the validity of that sale depends upon the validity of the judgment.

It is a principle governing all courts of judicature that a judgment of a tribunal which has no jurisdiction of the parties and subject matter is absolutely void, and must be so treated when the record is offered in

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evidence or used for any other purpose. *Buchanan v. Richer*, 9 *East*, 192; *Borden v. Fitch*, 15 *Johns.* 121; *Newdigate v. Davy*, 1 *Ld. Raym.* 742. In the case of *Newdigate v. Davy*, Sir Richard Newdigate gave a donation to Davy, and afterwards removed him and put in S. Davy, in the time of James II., cited Newdigate before the high commissioners, who restored Davy, and made Newdigate pay to him all the arrears he had received. After the revolution of 1688, Newdigate brought *indebitatus assumpsit* against Davy for money as paid to his use. The court gave judgment for the plaintiff, because it was money paid in pursuance of a void authority.

There must be a decree to the following effect :

Decree.—This cause came on to be heard at this term of the court, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows :

First. That partition be made of the premises in the bill of complaint described, so that one moiety thereof shall belong to the complainant in severalty, and be to him delivered for his several possession and enjoyment forever.

Second. That William R. Boggs, A. R. Wilson, and A. S. Hartridge, Esquires, be appointed commissioners to make such partition in terms of the law, and report their action to the next term of this court ; and if the said commissioners should find it impracticable to divide the said premises into two equal moieties, so that one of the same may be assigned to the complainant, then they shall report that fact to the court, and abstain from further action until further order.

Third. That Edward J. Harden, Esquire, a counselor of this court, is hereby appointed a master in chancery *pro hac vice*, in this case, to take account between the complainant, John M. Cuyler, and the defendants, John C. Ferrill *et al.*, of all rents and prof-

Campbell's Case.

its (if any) that may be due from the latter to the former, whether by reason of the actual receipt and collection of rents and profits issuing out of said premises, or by reason of the occupation of said premises by said defendant himself; charging said defendant with one moiety of the whole, and giving him credit for one moiety of the actual and necessary expenses incurred and paid by him touching said premises.

CAMPBELL'S CASE.

District Court; Western District of Pennsylvania,
1867.

INJUNCTION.—POWERS OF DISTRICT COURTS.

A district court has not power to enjoin the prosecution of an action in a State court.

The Bankrupt Act of 1867 does not confer such power, even in aid of proceedings in bankruptcy; nor does it impair the rule prescribed by the act of March 3, 1793, forbidding injunctions to stay proceedings in courts of a State.

Motion to dissolve an injunction.

Golden & Foster, for the motion.

Mr. Patterson, opposed.

McCANDLESS, J.—I feel the grave responsibility which attaches to the decision about to be announced.

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In construing a new and untried statute, and establishing the practice to be observed in its proper administration, there must necessarily be much diversity of opinion among both lawyers and judges. The interests involved are frequently so large and the principles so important, that inextricable confusion must result from an unsound interpretation of the legislation of Congress. This Bankrupt Act is highly beneficial to both the debtor and the creditor. It was designed to relieve the one from oppressive liabilities, which render him unfit to contribute to the productive wealth of the country ; and it affords the other an assurance that all the property of the debtor, except what from motives of humanity he is permitted to retain, shall be honestly devoted to the payment of his debts. With a fraudulent creditor it is wisely and justly stringent, compelling a full discovery and surrender of his assets, for the benefit of his creditors, under peril of imprisonment for contempt—a penalty not to be disregarded.

The present is a case upon creditors' petition to declare Hugh Campbell a bankrupt. Numerous acts of bankruptcy have been assigned, all of which are denied, and a trial by jury awarded. Many judgments of large amount, the validity of which is not questioned, have been entered in the court of common pleas of Armstrong county ; and they are all prior in date to the period when the Bankrupt Law went into operation. Upon final process, a sale of real estate by the sheriff has been made, and twenty-nine thousand two hundred and ninety dollars realized and brought into court for distribution. Under these circumstances our extraordinary power of injunction was invoked to restrain not only the plaintiffs in these judgments, but the courts of the State and their executive officers from further proceeding, with the design to bring all the property of the bankrupt into this court, as a court of bankruptcy, for division among all his creditors.

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The injunction against the sheriff and the parties was granted, with leave, *instanter*, for a motion to dissolve, that we might ascertain whether, under the Bankrupt Law, we have the right to interfere with the courts of the State in the legitimate exercise of their functions.

After much reflection I am satisfied we have not, nor with the actors or parties litigating before them.

The first section of the act is wide in its scope, and would seem to bring all parties, estates, and interests connected with the bankrupt into a common forum or center. And to do so, it is contended that Congress, by implication, conferred upon the district courts of the United States the authority to suspend all and every proceeding elsewhere, and to command obedience to their mandates, exclusive of all other jurisdictions. This, by virtue of the fifth clause of the eighth section of the first article of the constitution of the United States, granting the power "to establish uniform laws on the subject of bankruptcies throughout the United States," Congress had the right to do,—but they have not done so.

Staring them in the face was the act of March 2, 1793, § 5, expressly declaring, "Nor shall a writ of injunction be granted to stay proceedings in any court of a State." There is nothing in the Bankrupt Law in terms repealing this statute, and the authority conferred by section 40 to issue an injunction against the bankrupt and all other persons, excludes the presumption that it is to be exercised without limitation. Other "persons" here expressed, has reference to parties interfering with the property of an individual not yet adjudicated an involuntary bankrupt, and which is to be preserved inviolate, until his bankruptcy has been legally ascertained. It does not refer to the courts of a State, or to their executive officers. It was not designed to arrest the whole machinery of another and independent forum, which is exercising its best efforts

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to marshal the assets of the debtor, and after discharging the legitimate liens to which they are subject, reserving the residue as a fund for the assignee in bankruptcy.

Liens by this law, as they should be, are held sacred. To say that the vigilant creditor, who by his diligence has secured his debt, and has a valid lien upon the property of the bankrupt, shall come in with all the other creditors *pro rata*, would be a perversion of the purposes of Congress in the passage of the act. No right acquired by the creditor is affected or impaired. Section 14 expressly protects him. The assignee has authority, under the direction of this court, to discharge any lien upon any property, real or personal, and is authorized to sell the same subject to such lien or other incumbrances. By section 15 he is permitted to sell all unincumbered estates, real and personal, on such terms as he thinks most for the interest of the creditors. Where there is a lien on real or personal property, section 20 admits the holder of the lien as a creditor in bankruptcy for the balance of the debt, after deducting the value of the property, to be ascertained by agreement or sale, or the creditor may release or convey his claim to the assignee, and be permitted to prove his whole debt in bankruptcy.

These several sections are distinct recognitions by Congress of the sanctity of liens, obtained before the inception of proceedings in bankruptcy, and they control, and are a limitation of the sweeping provisions of the first section. It is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other. The most general and absolute term of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together.

All liens then remain intact. The bankrupt's final

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certificate operates to discharge his person and future acquisitions, while, at the same time, the mortgagee or other lien creditor shall be permitted to have his satisfaction out of the property mortgaged or subject to lien. A legal right without a remedy would be an anomaly in the law. 7 *How.* 623.

It is true that section 1 of the act declares that the jurisdiction conferred on the district court of the United States shall extend to "all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy." But as the supreme court of the United States say, in the case of *Peck v. Jenness*, before quoted in 7 *How.*, the court of common pleas of Armstrong county has full and complete jurisdiction over the parties and the subject matter; and its jurisdiction had attached long before any act of bankruptcy was committed. It is an independent tribunal, not deriving its authority from the same sovereign; and is, as regards the district court, a foreign forum, in every way its equal. The district court has no supervisory power over it.

When the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties would be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or other process, for this would produce a conflict of jurisdiction extremely embarrassing in the administration of justice. The fact, therefore, that an injunction issues only to the parties before the court, and not to the court

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itself, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.

It follows, therefore, that this court has no supervisory power over the court of common pleas of Armstrong county by injunction or otherwise, unless it is conferred by the Bankrupt Law. But we cannot discover any provision in that act which limits the jurisdiction of the State courts, or confers any power on the bankrupt court to supersede their jurisdiction, or wrest property from the custody of their officers. On the contrary it provides, in section 14, that the assignee "may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party, in his own name, in the same manner, and with the like effect, as they might have been prosecuted or defended by such bankrupt." In other words, as to the estate and property of the bankrupt, the assignee is subrogated to all his rights and responsibilities. The act sends the assignee to the State court, and admits its power over him. It confers no authority on this court to restrain proceedings therein, by injunction or other process, much less to take property out of its custody or possession with a strong hand.

Finding no such grant of power, either in direct terms or by necessary implication, from any of the provisions of the Bankrupt Law, we are not at liberty to interpolate it on any supposed grounds of policy or expediency. We shall, therefore, be compelled to dissolve this and all other injunctions in similar cases.

I have not submitted this opinion to my brother GRIER; but it may be a source of gratification to the profession to learn that, sitting with him recently, at circuit in Philadelphia, we conferred upon this case,

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and I am pleased to say that he concurred in the legal principles upon which it should be decided.*

Injunction dissolved.

THE LULU.

*Circuit Court, Fourth Circuit ; District of Maryland,
April T., 1868.*

“FOREIGN PORT.”—MARITIME LIEN FOR SUPPLIES.

A port in another State from that in which a vessel is enrolled and registered, is deemed, in the absence of special facts controlling the question, a “foreign” port, within the rule which confines the maritime lien for supplies to cases of supplies furnished in a foreign port. To entitle a material-man to claim a maritime lien upon a vessel for supplies furnished to her in a foreign port, upon the order of the master, he must show that the supplies in question were necessary to the vessel, and also that some special exigency or necessity existed to require the master to obtain them upon the credit of the vessel. To show only that the supplies were needed, is not enough.

Hearing upon several libels for repairs and supplies.

The principal suit was brought by the persons composing the firm of Skinner & Forsyth, for repairs made

* In Burns' Case, argued and decided at the same time with Campbell's Case, reported in the text, the same doctrine was re-asserted. See 7 *Am. Law Reg. N. S.* 105.

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upon the steamer Lulu. It was heard with other suits for supplies. Other facts appear in the opinion.

CHASE, Ch. J.—This is a suit in admiralty to enforce a lien claimed upon the steamer Lulu, for repairs made upon her by the libelants at the request of the master.

It is consolidated with other suits, all brought by material-men for supplies or repairs to the vessel.

The Lulu was a steamer owned in New York, which was her home port, but employed in the trade between Baltimore, in Maryland, and Charleston, in South Carolina. When the libel was filed she had been in the trade about eleven months—from April, 1866, to March, 1867. The repairs and supplies for which satisfaction is sought, were furnished in Baltimore, during and after July, 1866; but chiefly in November and afterwards. They were furnished at fair prices, and were proper and necessary.

In each suit the New York Guaranty & Indemnity Company has filed a claim and answer, asserting a prior right to satisfaction out of the proceeds of the steamer; which has been sold under an order of the court. The claim of this respondent is founded upon a bill of sale made to the company on August 24, 1866, by the former owners of the Lulu, in consideration of twelve thousand dollars. This bill of sale, though in form absolute, was intended as a mortgage to secure repayment of the advance, in six months from the date; but no part of it has been repaid.

The only question in this cause is, whether the material-men, under the circumstances of the case, had a lien for their repairs and supplies; for if they had, this lien is superior to that created by the bill of sale or mortgage, whether prior or posterior in time.

It was insisted on the argument, that Baltimore was the real home port of the Lulu, and that there could be no lien for repairs and supplies furnished in the home

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port ; and this might be a material circumstance in the decision of the case, if it appeared that the Lulu was chartered to citizens of Baltimore, for the Charleston trade. Such a charter might be considered as transferring her home port from New York to Baltimore ; especially when taken in connection with the proved facts of the case, which show that Baltimore might very fairly be called the actual home of the Lulu, during the time of the transactions in controversy. But there is no evidence of such a charter ; and it is clear that under the American decisions, Baltimore, being in another State than that in which the vessel was owned and enrolled, must be regarded as a foreign port ; and that, in a proper case, material-men would be entitled to a lien for supplies there furnished.

The question then occurs, "Were the repairs and supplies in question furnished under such circumstances as would entitle the material-men to the liens which they claim ?"

The general rule applicable to this class of cases was first laid down in *The General Smith*, 4 *Wheat.* 443, as follows : "When repairs have been made or necessities have been furnished to a ship in a port of a State to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and he may well maintain a suit *in rem* in the admiralty to enforce his right." The same rule, in substance, was affirmed in *Peyroux v. Howard*, 7 *Pet.* 324 ; in *The Nestor*, 1 *Sumn.* 73 ; and in several other cases. The nature and degree of necessity essential to the creation of a lien for repairs and supplies was much considered in the case of *The Laura*, or *Thomas v. Osborn*, 19 *How.* 28, 35. The court then said, in substance, that it is only in case of necessity that the master can hypothecate the vessel by a bottomry bond or other express obligation, or create a lien by obtaining repairs and supplies on her credit

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(p. 30), and that, to constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them (p. 31). If the master has funds which he ought to apply in payment, but does not, and the furnisher knows this fact, or has the means by due diligence to ascertain it, then no case of actual necessity to have a credit exists, and no maritime lien is created by furnishing repairs and supplies. The rule on this point was stated by Ch. J. TANEX, who, with Justices McLEAN and WAYNE, dissented from the judgment of the majority, somewhat less stringently, as follows: "That repairs and supplies in a foreign port, if necessary to enable a vessel to proceed, are presumed to have been furnished and made on the credit of the vessel, unless the contrary appears, as well as on that of the master and owners; and creates a lien which may be enforced in admiralty" (p. 38). The difference between the court and the dissenting justices on this point was that the former held that, in order to the creation of the lien, there must be a necessity for the credit as well as a necessity for the supplies, while the latter seem to have thought that if the supplies were necessary the credit may be presumed.

The same subject was further considered at the same term in the case of *The Sultana*, or *Pratt v. Reed*, 19 *How.* 359. That case was in its general features much like the cases now under consideration. It was a libel against the steamer *Sultana* for supplies of coal furnished from time to time, from June 1852, to May 1854, and the lien for supplies was contested by the answer, which set up a claim under a prior mortgage on the steamer, dated October 31, 1863. The court held that the material-man had no lien, and decreed the proceeds to the mortgagees. The court stated the rule thus: The proof of a necessity at the time of procuring a

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supply for a credit on the vessel . . . "is as essential as that of the necessity of the article itself." It is only under very special circumstances and in an unforeseen and unexpected emergency that an implied maritime hypothecation can be created.

The decision of the case was not put upon the ground that the supplies were unnecessary, but upon the ground that there was no sufficient proof of a necessity for the implied hypothecation of the vessel, or of any unexpected or unforeseen exigency that required it.

A distinction between the cases now to be adjudged and the cases thus decided was attempted in the argument; but I find myself unable to make any which has substance. That decision was by a unanimous court, and was on the very point which must govern these cases; namely, the necessity of the credit; and I am unable to discover any very special circumstances, any very unexpected and unforeseen emergency in these cases which will take them out of the application of the rule which the decision cited establishes. The repairs and supplies in all of the cases now presented were furnished in the ordinary course of trade, and under ordinary circumstances. There is no proof whatever of any unusual exigency. Except in the case of Coleman and Bailey, there is no averment of the necessity of a credit to the steamer.

It was contended also that the rule goes beyond any that has heretofore been applied to material-men by the courts; and I must admit, that I have found no other case in which proof so stringent as that required by it has been held essential to a lien for repairs and supplies. But the rule established by the unanimous judgment of the supreme court is not on that account the less binding upon me.

I am constrained, therefore, to hold that the furnishing of the repairs and supplies set forth in the several

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libels did not create a maritime lien in favor of the libelants; and that the respondents are entitled to the proceeds in the registry after payment of costs.

Decree accordingly.

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*District Court; Northern District of New York,
May T., 1868.*

CONSTRUCTION OF PENAL STATUTES.—“WILLFULLY.”
—FORFEITURE FOR VIOLATING CUSTOM-
HOUSE SEALS.

To authorize a conviction under a penal statute prescribing a punishment for “willfully” removing an official seal from property which has been sealed up by officers of the customs, it must appear that the defendant not only intended to remove the seal, but that he had at the time a knowledge of its character. One who removes such a seal in ignorance of its character, and in the honest execution of a supposed duty in the care and transportation of the property, is not liable to punishment under the statute, for the reason that he cannot be deemed to have acted *willfully*.

The punctuation of a statute, as printed, affords no very decisive test of construction; but may be regarded as one indication of the meaning.

To warrant a forfeiture of property, under the last clause of section 5 of the act of June 27, 1864, for the unauthorized removal therefrom of a custom-house seal, affixed pursuant to other sections of the act, proof must be made that the removal was *willful*, in the same manner as would be necessary to sustain a conviction and punishment of the offender under the previous clause of the section.

Trial of an information.

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This information was filed against three railroad cars and three hundred barrels of flour, claimed to be forfeited by reason of an unlawful removal of a custom-house seal while the cars and contents were in course of transportation from Canada into the United States.

The property was claimed by the New York Central Railroad Company.

William Dorsheimer, District-Attorney, for the government;—Cited 3 *Wall.* 145 ; 3 *How.* 310 ; *Whart. Cr. L.* 401, note s ; Act of March 3, 1863, § 8, 12 *Stat. at L.* 740 ; Act of July 28, 1866, § 1, 14 *Id.* 328.

A. P. Laning, for the claimants;—Cited 2 *Bow. Dict.* 562.

HALL, J.—The information in this case is founded upon section 5 of the act of June 27, 1864. Section 1 of this act provides for the unloading and inspection, at the first port of entry or custom-house of the United States, of all merchandise and other articles imported into this country from any contiguous foreign country, except as thereafter provided. Section 2 provides that in order to avoid the inspection at the first port of arrival, as required by section 1, cars, &c., containing such merchandise or other articles may be sealed or closed, under regulations authorized by such act to be prescribed by the secretary of the treasury ; “whereupon the same may proceed to their port of destination without further inspection.” It also provides that such cars, &c., shall proceed, without unnecessary delay, to their destination, as named in the manifest of their contents, and be there inspected as provided in section 1. Section 3 authorizes the secretary to make regulations for the sealing and closing of cars, &c., and sections 4 and 5 are in the following words :

“Sec. 4. *And be it further enacted*, That if the

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owners, master, or person in charge of any vessel, car, or other vehicle, sealed as aforesaid, shall not proceed to the port or place of destination thereof named in the manifest of its cargo, freight, or contents, and deliver such vessel, car, or vehicle, to the proper officer of the customs, or shall dispose of the same by sale or otherwise, or shall unload the same or any part thereof, at any other than such port or place, or shall sell or dispose of the contents of such vessel, car, or other vehicle, or any part thereof, before such delivery, he shall be deemed guilty of felony, and on conviction thereof, before any court of competent jurisdiction, pay a fine not exceeding one thousand dollars, or shall be imprisoned for a term not exceeding five years, or both, at the discretion of the court; and such vessel, car, or other vehicle, with its contents, shall be forfeited to the United States, and may be seized whenever found within the United States, and disposed of and sold as in other cases of forfeiture: *Provided*, that nothing in this section shall be construed to prevent sales of cargo, in whole or in part, prior to arrival, to be delivered as per manifest, and after due inspection."

"Sec. 5. *And be it further enacted*, That if any unauthorized person or persons shall willfully break, cut, pick, open, or remove any wire, seal, lead, lock, or other fastening or mark attached to any vessel, car, or other vehicle, crate, box, bag, bale, basket, barrel, bundle, cask, trunk, package, or parcel, or anything whatsoever, under and by virtue of this act and regulations authorized by it, or any other act of Congress, or shall affix or attach, or in any way willfully aid, assist, or encourage the affixing or attaching by wire or otherwise, to any vessel, car, or other vehicle, or to any crate, box, bale, barrel, bag, basket, bundle, cask, package, parcel, article, or thing of any kind, any seal, lead, metal, or anything purporting to be a seal authorized by law, such person or persons shall be deemed guilty

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of felony, and upon conviction before any court of competent jurisdiction, shall be imprisoned for a term not exceeding five years, or shall pay a fine of not exceeding one thousand dollars, or both, at the discretion of the court. And each vessel, car, or other vehicle, crate, box, bag, basket, barrel, bundle, cask, trunk, package, parcel, or other thing, with the cargo or contents thereof, from which the wire, seal, lead, lock, or other fastening or mark, shall have been broken, cut, picked, opened, or removed, by any such unauthorized person or persons, or to which such seal or other thing purporting to be a seal, has been wrongfully attached as aforesaid, shall be forfeited to the United States."

The information, after stating the seizure of the property in question, alleges the proper sealing and closing of the three cars containing the three hundred barrels of flour, at Clifton, in Canada, by the consul of the United States, as authorized by the regulations prescribed under the authority of the act of Congress; that said cars were permitted, by reason thereof, to enter and pass the port of Niagara without inspection; and that before the said cars arrived at the port of their destination, the seals, by which said cars had been sealed and closed by the consul, were broken, cut, opened, and removed from each and all of the said cars by some unauthorized person, by which such cars and their contents had become forfeited.

The information does not allege that such seals were "*willfully*" broken, cut, opened or removed; nor does it contain any allegation that the same was done willfully or maliciously, or with any fraudulent, corrupt, unlawful, or improper purpose or intent.

The answer of the claimants admits the material allegations of the information, but sets up that the seals of the consul were removed from such cars by mistake, and not willfully, nor for the purpose of violating any

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act of Congress, or any regulation of the treasury ; nor for the purpose of interfering with, or removing any of the property contained therein ; that said cars were not opened, nor was any of the property therein removed, or interfered with ; and that such seals, and the wires to which they were attached, were so removed by an employee of the railroad company, in ignorance of their character, and of their being the seals of the consul, and for the purpose of putting on the doors of the cars a fastening which it had been the custom to place thereon, and thereby make the same more secure.

At the trial the jury returned a special verdict by which they found that the seals of the consul, affixed to the cars of the claimants, as stated in the information, were removed by an unauthorized person who was in the employ of the claimants ; but that they were so removed in ignorance of the character and purpose of such seals, and without knowing by whom, or why, or for what purpose they had been placed upon said cars ; that they were so removed for the purpose of making the fastening of said cars more secure, without any improper or illegal motive or intention, or any desire or purpose to defraud the government, or enable any person to do so ; and that no officer, agent, or employee of the claimants aided, or assisted in, or directed or authorized such removal, or in any manner consented thereto.

Upon these pleadings, and this special verdict, the counsel for the claimants insisted, in substance : 1. That in order to a conviction of a person for removing seals under the first clause of section 5, above quoted, it is necessary to show that the removal of the seals was *willful* ; that this was not shown by the evidence in this case, and is negatived by the special verdict. 2. That the forfeiture declared by the last sentence of the section is only a further penalty for the commission of the act made criminal by the preceding sentence, and

that there can be no forfeiture unless the facts proved would justify a criminal conviction of the party by whom the seals were removed.

1. The first question thus presented depends mainly upon the signification, purpose, and effect of the term *willfully*, as used in the section referred to; and it must be conceded that the question is not free from doubt. The words *knowingly*, *willfully*, and *maliciously*, either singly or united, or one of them connected with another, have been frequently used in criminal and penal statutes; but their signification and effect have not been, and cannot be, so precisely defined that different interpretations are not required in different cases,—depending to some extent upon the connection in which they are found. The first of these words does not, in common parlance, or in legal construction, necessarily and *per se*, imply wicked purpose or perverse disposition, or indeed any evil or improper motive, intent, or feeling; but the second is ordinarily used in a bad sense to express something of that kind, or to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty. The last of these terms, *maliciously*, in its ordinary sense, and when used in criminal or otherwise penal statutes, implies the existence of a wicked, base, or revengeful purpose, or an evil disposition and wanton disregard of the rights of others; though in its technical sense, as used in the merely formal, though necessary allegations of an indictment, it generally has a less noxious signification, implying that legal malice which is presumed to exist whenever any unlawful and injurious act is voluntarily committed, rather than the actual existence of malignant feeling and evil purpose. In its ordinary sense, and when used in statutes, it is generally considered as including the term *willfully*, and something more; and it has therefore been held that in an indictment

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founded on a statute requiring the act charged to be willfully done in order to make it criminal, charging that the act was done *maliciously* was sufficient; but when the words *willfully and maliciously* are both used in the statute creating the offense, it was held that both must be used in the indictment, and that an allegation that the act was done *unlawfully and maliciously* was not sufficient. *Arch. Cr. P.* 50.

The definitions given by our best lexicographers, as well as the authority of legal writers, show that *willfully* is ordinarily used in a bad sense. WEBSTER, whose definitions are most reliable, gives as the proper definition of *willful*, in its present use, "governed by the will without yielding to reason; obstinate; perverse; inflexible; stubborn; refractory;" and he gives as the definition of *willfully*, "in a willful manner; obstinately; stubbornly."

Upon the best consideration I have been able to give to this case and to the authorities which my researches have discovered, I am quite confident that neither the evidence nor the special verdict will justify the conclusion that the removal of the seals of the consul, as found by the verdict, was *willful*, within the meaning and intent of the act of Congress.

It is true, that a person who deliberately does an act which he knows to be unlawful, or wrongful, is generally held to have done it willfully; and the familiar doctrine that a person is conclusively presumed to know the law of the country of his domicile or temporary sojourn, was pressed upon the court for the purpose of bringing this case within the principle of the cases in which this doctrine has been applied. Without considering the question whether the regulations presented by the secretary of the treasury, under an act of Congress, are to be considered as laws, it must be observed that in all cases of this kind the intention of the legislature is to govern; and that when, as in

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this case, the act must be *willfully* done to make it criminal, it can hardly be supposed that the legislature intended to declare an act committed without any illegal or improper motive, and under the honest belief that it was entirely right and proper, to be a felony punishable, in the discretion of the court, by a large pecuniary fine and five years' imprisonment. Indeed, under such proof of the absence of all criminal or improper intent or feeling, eminent judges have directed acquittals in cases where the punishment authorized was much less severe.

In the case of *United States v. Hart*, *Pet. C. Ct.* 390, Mr. Justice WASHINGTON held that a constable who stopped and detained the mail-coach, by arresting the driver because he was driving through the streets of Philadelphia at a speed which was considered dangerous to the persons of its citizens, was entitled to a verdict of not guilty on an indictment founded upon a statute making it criminal for any person "*knowingly and willfully* to obstruct or retard the progress of the mail;"—the judge holding that driving at a dangerous speed, upon the streets of the city, was a breach of the peace and an offense at common law, and authorized an arrest of the offender without a warrant;—and that it could not therefore be said that the act was a *willful* stopping of the mail;—and this decision was referred to and approved by Mr. Attorney-General CRITTENDEN, in an opinion furnished the postmaster-general in 1852.

I am aware that the authority of Mr. Justice WASHINGTON's decision may be said to have been shaken by the decision of Mr. Chief Justice TANEY, in *United States v. Harvey*, 8 *Boston Law Rep.* 77. The chief justice felt it to be his duty to follow a decision, made in the same district, by Judge WINCHESTER; and which he supposed to be in conflict, to some extent, with Mr. Justice WASHINGTON's decision; and he therefore decided that arresting and detaining the mail-

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carrier, under civil process, and thereby obstructing and retarding the progress of the mail, justified a conviction of the constable who made the arrest. This decision, and the case of *People v. Brooks*, 1 *Den.* 457, and other analogous cases, have raised doubts upon the question now under consideration ; but the decision of the chief justice was made during the hurry of a circuit, and it is quite certain that the case before Judge WINCHESTER was clearly distinguishable from those before Mr. Justice WASHINGTON and the chief justice, for reasons which do not appear to have been considered by the latter. In the case before Judge WINCHESTER the defendant was a private individual who had detained the mail by holding possession of the horses employed in its transportation, on the ground that he had a lien on them for food furnished for them, while engaged in that employment, prior to such detention ; and Judge WINCHESTER evidently reached the conclusion that no such lien existed, even against the owner of the horses, and that it was entirely clear that no such lien could be enforced against the right of the government to use the horses in the transportation of the mail. The act of detention was intentional and deliberate, and under such circumstances that the defendant was bound to know that it was without legal right, and in violation of law ; and, it was therefore held to be an offense under the statute. In the case before Judge WASHINGTON the defendant was in the execution of what he believed to be his duty as a peace-officer ; and in that before the chief justice the defendant was a constable, holding a civil process to arrest the mail-carrier, and he may well have supposed it to be his duty to execute the process in his hands. If he acted upon his honest conviction of duty, without improper motive or feeling, I confess my inability to assent to the propriety of his conviction. In short, I cannot believe that Congress, when expressly requiring that the act should be

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willful, intended to subject a public officer to indictment and punishment for honestly endeavoring to do what he really believed to be his official duty. I cannot believe that Congress, when it required the act to be *willful*, intended that an honest mistake upon a question of law, in respect to which the opinions of such eminent judges as Mr. Justice WASHINGTON and Judge WINCHESTER had been opposed, and which had not been settled by any later decision, should be punished as a crime.

This decision of the chief justice, and others which serve to sustain, to some extent, the position of the district-attorney, were doubtless based upon the maxim that "Ignorance of the law excuses no one," and in accordance with which a party is legally presumed to know what the law is, even when the question depends upon the intent and meaning of an act of Congress of which he has never heard, and in regard to which the opinions of judges and lawyers are not only in opposition but almost equally divided; and it can hardly be doubted that the term *willfully* is sometimes, if not generally, introduced into criminal and penal statutes to prevent the gross injustice that might otherwise be perpetrated in the strict application of the rule which requires this legal presumption in opposition to the real truth of the case.

But there is another view of the case which deserves consideration. The maxim "*Ignorantia juris non excusat*," has its co-relative in the maxim "*Ignorantia facti excusat*." *Broom Leg. Max.* 122. And while ignorance of the law, which every man is presumed to know, does not excuse, ignorance of a material fact may excuse a party from the legal consequences of his acts; more especially when such acts are criminal only when willful. Thus, if a man, believing a woman to be unmarried and free, marries her when she is in fact a married woman, he will not be

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criminally responsible. So, under the statute against willfully obstructing the passage of the mail, the stopping of a private carriage and horses, although such carriage and horses might at the time be actually employed in the transportation of the mail, would not be criminal if the fact of such employment was unknown to the party charged, and he had no reason to suspect the fact of such employment. Even where an act of Congress had made it criminal to cut or remove timber from the lands of the United States, without expressly requiring that the act should be willfully, or even knowingly done, it would seem to have been the opinion of the learned judge of the district of Michigan that evidence showing mistake, ignorance of the section lines, and a well founded belief that the timber was being removed from other lands than those of the United States, would constitute a good defense. *United States v. Schuler*, 6 *McLean*, 28, 42. And under an indictment for knowingly and willfully obstructing or resisting an officer in the discharge of his duties, it is well settled that it must be proved that the party charged had knowledge or notice that the party obstructed or resisted was an officer, and engaged in such official duties. *Whart. Crim. L.* §§ 1289, 1290; and see 5 *Mas.* 455; *Reed v. Davis*, 8 *Pick.* 515.

As the party who removed the seals in this case was wholly ignorant of their character and purpose, it may be doubtful whether he would have been guilty of an offense under section 5, so often referred to, even if the word *willfully* had not been used as descriptive of the criminal offense; and, upon the statute as it stands, and the whole case, I am of the opinion that neither the evidence nor the facts found by the jury would justify a conviction of the person who removed the consular seals, as alleged in the information. To convict a person of *willfully* removing official seals under proof clearly showing the absence of any will

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or intent to do that or any other unlawful or improper act, would seem to be palpably unjust. But the question which has now been discussed at great length is not, in strictness, involved in this case. The information does not allege that the seals were *willfully* removed, and the verdict of the jury establishes the fact that they were removed in ignorance of their character and purpose, and without improper or illegal purpose, motive, or intent.

Now, it is very clear, as a question of pleading, that the omission of the allegation that the seals were *willfully* removed,—this being absolutely necessary to the statutory definition of the offense intended to be charged,—would be fatal in an indictment against a party charged with such removal, unless, indeed, the sense of the word “willfully” was legally embraced in some other word used to characterize the act. This must dispose of the case, if the second position of the counsel for the claimants can be maintained. It is true that, in a proper case, a court might allow a defect of that kind to be remedied by an amendment; but, under the proofs in this case, it is clear no amendment of that kind should be allowed. The evidence showed that the seals were removed by a subordinate employee of the claimants, who had been directed by the station agent to put upon the cars the leaden seal of the station, and had him furnished with leaden blanks for that purpose; that the station seal had been usually placed on a peculiar kind of lock, which had been in use on the cars, and on which said leaden blanks for the station seal were intended to be used; that when this employee went to the cars to affix the station seals, he found no locks upon the cars, and could not, therefore, do as he had been directed without placing the locks thereon; that he went to the depository of such locks, in the station, and obtained the necessary locks, and put the same on the cars, and affixed the

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station seal thereto ; that he found that in order to put said locks and the station seals on the cars, it was necessary to remove the wires and leads that he found thereon, and that he did so remove the same for that purpose, and after having done so, reported the facts to the station agent ; that the station agent, understanding from this report that consular seals had been removed, immediately went with the person who removed them, to the consul at Clifton, and reported the facts and circumstances of such removal ; that the consul declined doing anything in the matter, as his duties were to be discharged in Canada, and directed the station agent to report the facts to the collector on this side ; that affidavits showing the mistake, and the facts in regard to the removal, were made by the station agent and the employee, but that the collector seized the property and insisted upon the forfeiture. Under such proof, and the finding of the jury in this case, no court should allow an amendment, in order to decree a forfeiture of the property of parties entirely free from all suspicion of blame.

This point upon the pleadings was not raised upon the argument, and it did not occur to me afterwards until I had nearly completed my examination of the authority I have referred to. Having performed the labor of searching for and examining the authorities, I have thought it better to express my opinion upon both the questions argued, rather than to dispose of the question of the construction and effect of the first sentence of section 5 of the statute, upon the ground that no willful removal of the seals is alleged in the information. If the question were now evaded, I might soon be called upon to decide it upon an indictment.

The remaining question which was argued by counsel is, in substance, whether the last sentence of section 5,—which declares the forfeiture,—is so connected

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with and dependent upon the preceding sentence that a *willful* removal of the consular seals must be alleged and proved to entitle the government to a forfeiture of the property in controversy ; and it need hardly be said that the question is not free from doubt. The latter part of the section is closely connected with the first by its general relation to the same subject matter, and by a copulative conjunction ; and without such connection, or some reference to prior provisions of the act, the last sentence of the section would be wholly inoperative. And there is certainly much reason for saying that the forfeiture provided for is intended as a cumulative penalty for the commission of the act just made criminal. The word *such* in the expression "*such* unauthorized person," can only refer to the person just referred to,—that is, one who has *willfully* removed the seals just described ; and these *indicia*, though not controlling, must strengthen the probabilities that Congress did not intend to declare that consequences so penal as the forfeiture of the merchandise of an entire stranger to the transaction, and of a carrier wholly innocent of blame, should be visited upon such parties, because a third person, equally innocent of improper or unlawful intentions, had, by mistake, and in ignorance of their character and purpose, removed the seals of a government agent. It may well be that Congress intended that property owners and carriers should be responsible for the integrity and good faith of those to whom they had entrusted the care of merchandise and property, passing through the country under official seals ; but it can hardly be supposed that this responsibility was intended to be extended to a case like the present.

The words "as aforesaid," near the close of the section, may have been intended to apply to the first as well as to the last portion of the sentence, and if a comma were inserted immediately before these

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words, as well as after them, such would, I think, be the necessary construction of the sentence. There is, however, no comma immediately before those words, and though the punctuation of a statute, as printed, affords no very decisive means for determining its construction, yet, so far as it affects the question, the punctuation is undoubtedly an indication that the words "as aforesaid" are only intended to apply to the affixing and not to the removing of seals.

But a strong argument in favor of giving these words a broader application may be based upon the fact that they would seem to have no effect unless they can be applied to the first branch of the sentence. The word *such* precedes the words "seals, or other thing purporting to be a seal," and the word *wrongfully* is used in respect to the attaching of seals, so that there would seem to be no reason for using the words *as aforesaid* in regard to the attaching of seals, whilst their use in respect to the removal of seals would render it clear that the forfeiture for such removal was intended only when such removal was *willful*.

After a careful consideration of the language of the act, I am strongly inclined to the opinion that in order to produce a forfeiture there must be proof that the consular seals were willfully removed.

It must be conceded that the construction which I have deemed it my duty to give to the statute on which the proceedings in this case have been based, is not free from doubt; but if the questions discussed were more doubtful, and even if the judicial mind was slightly inclined to the opposite construction, rather than to the one now adopted, it is supposed that in a case like this, involving a forfeiture, and when no improper motive existed, the final judgment of the court should still be for the claimants. In the case of *The Enterprise*, 1 *Paine*, 34, Mr. Justice LIVINGSTON said: "A court has no option when any considerable am-

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biguity arises on a penal statute, but is bound to decide in favor of the party accused ;" and although this doctrine ought not to be acted upon except in a case of serious and considerable doubt, it may well be considered as relieving a court from all embarrassment in deciding a case like the present.

The claimant must have judgment upon the special verdict, but, as the law of the case was unsettled and doubtful, the usual certificate of probable cause will be granted, notwithstanding the fact that I have a very decided opinion that the case is one which should not have been prosecuted. After the facts had been made known to the collector, and the removal of the seals had been shown by affidavit to have been made by mistake, the collector would have, in my judgment, done all that his duty required if he had directed the cars to be returned to the Canada portion of the Suspension Bridge, and procured the consul to renew the seals thereon. And if the consul had declined to do so, I think the collector might then have properly taken other measures to secure the government against injury by reason of the mistake made by the railroad employee, and even advised the remission of the forfeiture, if any one had claimed that a forfeiture had been incurred.

Decree accordingly.

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*Circuit Court, Ninth Circuit; District of California,
February T., 1867.*

DAMAGES.—LIABILITY OF MILITARY OFFICERS.—SUS-
PENSION OF THE HABEAS CORPUS.

In actions for false imprisonment exemplary damages are only given where it appears that the wrong of which the plaintiff complains was done with an evil intention, or from a bad motive. Where it appears that the arrest of the plaintiff was made in the course of what the defendants supposed to be their duty as public officers, and without malice, and from good motives, only compensatory damages should be given.

A military officer who orders the arrest and confinement of an individual is bound to see that his subordinates, to whom the execution of the order is entrusted, use no unnecessary severity or cruelty in carrying it into execution; and he is liable in damages for oppression or undue harshness practiced by them through his neglect to superintend the course of his subordinates.

Although mere words will not *justify* an assault and battery or a false imprisonment, yet in an action for imprisoning the plaintiff without cause, seditious language used by him, of a gross and violent character, and which influenced the defendant to order his arrest, may be proved in mitigation of damages.

Except in a plain case of excess of authority, where at first blush it is palpable to the commonest understanding that the order given is illegal, a military subordinate should be held excused, in law, for acts done in obedience to the orders of his commander.

This rule is equally applicable whether the legality of the order depends upon a question of fact or upon a question of law.

It is competent to Congress to pass a law authorizing the president to suspend the privilege of the writ of *habeas corpus*; and this power extends to enable them to pass laws indemnifying or protecting officers against actions for arrests previously made.

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But the president has no authority to suspend the writ of *habeas corpus*, except as authorized and directed by Congress.

Trial by the court.

This was an action brought by John McCall against Irwin McDowell and Charles D. Douglas, to recover damages for the military arrest and confinement of the plaintiff. The facts out of which the controversy arose are fully stated in the findings of fact with which the opinion concludes.

DEADY, J.—On the trial of the issue in this action, by the court, the defendants were allowed to give evidence of the circumstances attending the promulgation of Order No. 27 (see p. 241, *infra*), and the consequent arrest and imprisonment of the plaintiff; not as a justification, but in mitigation of damages. From the evidence the court has found the fact to be, that the defendant, McDowell, issued the order which led to the arrest and imprisonment complained of, without malice or any intention to injure or oppress the plaintiff, but from good motives and considerations involving the public peace and safety; and also, that the defendant, Douglas, acted in the premises without malice or evil intention, but in obedience to the order of his superior, and upon satisfactory information that the plaintiff's conduct had brought him within the purview of the order. These facts, although not sufficient to constitute a legal justification of the conduct of the defendants, are to be considered in estimating the amount of damages which the plaintiff is entitled to recover. The acts complained of, being done without the authority of law, the plaintiff, as a matter of law, is entitled to recover some damages therefor. But vindictive or exemplary damages are only given where it appears that the wrong complained of was done with an evil intention or from a bad motive. In the present case, no such inten-

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tion or motive can be attributed or imputed to either of the defendants. It follows that the plaintiff is only entitled to recover damages for the necessary consequences of the act complained of—what the law calls compensatory damages.

Still what are merely compensatory damages, in a case like this, is difficult of determination, and is, after all, a matter of opinion, not to say conjecture, rather than direct proof. The only loss which the plaintiff sustained, that can be at all accurately computed and compensated in money, is his loss of time and expenses. What his time was worth does not directly appear, and can only be inferred from his occupation and position in life. Allowing him for this, at the rate of five dollars per day for twenty-one days, which includes the two days that he was in the custody of the civil authorities, would make the sum of one hundred and five dollars, which, added to his expenses and counsel fees, would amount to two hundred and fifteen dollars. In estimating the damages of the plaintiff, beyond this amount, there is no guide but the judgment, and the rule that they are to be given as a compensation to the plaintiff and not as a punishment of the defendants or an example to others. In estimating the damages of the plaintiff beyond his expenses and loss of time, I have been materially influenced by the facts, that while in the custody of the provost marshal in San Francisco he was confined one night in the common guard house in company with drunken soldiers, and that while he was in custody at Fort Alcatraz he was compelled to labor in common with military culprits. The treatment of the plaintiff in these respects, was, to say the least, oppressive and uncalled for. True, it does not appear that this was done with the knowledge or approbation of defendant, McDowell, but so far as appears, it would seem that he did not expect or intend that "political prisoners" should be required to labor while at Fort

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Alcatraz. The plaintiff was not in the actual custody of the defendant, McDowell, but of his subordinates, and his treatment in these respects was the direct act of the latter and not the former. Yet, McDowell, having caused the arrest and imprisonment, ought to be held responsible for whatever injuries and indignities the plaintiff suffered thereby, in consequence of his neglect or omission to provide against the same. The provost marshal's office and Alcatraz were within the command and under the authority of McDowell, and having caused the imprisonment of the plaintiff, he should have taken some precaution to prevent his being treated with undue harshness and severity while in custody at these places. In *Dinsman v. Wilkes*, 12 *How.* 405, which was an action brought by a marine against Commodore Wilkes, for illegal imprisonment in a jail at Honolulu, the supreme court say, that "it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect." It is proper to add that the court held Wilkes to something more than the ordinary responsibility of a commanding officer in that respect, because "he had placed him out of the protection which the ordinary place of confinement on shipboard afforded, in a prison belonging to and under the control of an uncivilized people." So it appears to me in this case, the plaintiff being a private citizen not belonging to the military forces, nor under condemnation as a criminal, when the defendant, McDowell, caused him to be imprisoned with military culprits and persons subject to military law and discipline, it was his duty to provide that the plaintiff should not be confounded with them and treated like them. And although, as I have said, I am satisfied that the defendant, McDowell, neither expected or intended that the plaintiff should be subject to any treatment or discipline beyond what was necessary and

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proper to restrain him of his liberty for the time being, yet as such treatment and discipline were among the probable consequences of the plaintiff's confinement, when and where it took place, if not provided against by the department commander, I think he must be held responsible for it.

In considering the question of damages, I have also taken into account the conduct of the plaintiff, which directly provoked his arrest. I refer to the gross and incendiary language uttered by him on the public highway, on April 20 and 29. Of course I do not mean to assert that the utterance of these words by the plaintiff, as the law then stood and still stands, was technically a crime. Such utterance did not constitute a crime, and therefore was not a legal cause of arrest. Yet in actions for injuries to the person, the misconduct of the plaintiff by which such injury is provoked is always considered in mitigation of damages. 2 *Greenl. Ev.* § 267. Mere words do not constitute an assault, and therefore will not justify a battery, yet when the words are calculated to provoke and do provoke the battery, they may be given in evidence to mitigate the damages. If one calls another a liar, this does not justify an assault by the insulted party ; yet if an assault follow in consequence of the insult, the provocation must be considered in estimating the damages. This rule, it seems to me, may be properly applied in this case. If the plaintiff had uttered these words in the immediate presence of General McDowell, and the latter had knocked him down on the instant, the law would have allowed the provocation to be shown in mitigation of the damages resulting from the illegal blow. In this case the arrest and imprisonment of the plaintiff, although without authority of law, was, I may say, procured and provoked by conduct on his part at once dangerous and disgraceful, and well calculated at that moment of intense public feeling and

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anxiety, to have brought harm on himself and trouble to the community. Talk and reason as we will about the liberty of speech, something is due to society from every reasonable being who enjoys its protection and privileges. At least, in such an hour of public sorrow and alarm as that which followed the assassination of the president of the republic, during the dangers of a civil war, the plaintiff, whatever his political prejudices or opinions, should have bridled his tongue so far as not to exult at the calamity of the nation, or mock at its fear.

I do not forget that on the trial the learned counsel for the plaintiff questioned the fact, whether the plaintiff used the language attributed to him by the witnesses, Purcell and Hale. The affidavits of these persons, upon which the arrest was made, have been read in evidence, and Hale, the witness to the words uttered on April 20, comes upon the stand, in the presence of the plaintiff, and testifies to the same effect as in his affidavit. There was nothing in the appearance or manner of the witness calculated to detract from his credibility. There was no contradictory testimony upon the point, either direct or circumstantial, and the court, sitting as a trier of the fact, could not have found it otherwise. But another circumstance makes it absolutely certain that the plaintiff substantially uttered the words imputed to him by these witnesses, as the court has found. On the trial, the plaintiff was in court, and was examined as a witness in his own behalf, yet his counsel forbore to interrogate him upon this point. The natural and irresistible inference from this omission is, that the plaintiff was conscious of the truth of the charge, and was too honest to deny it if he had been examined concerning it.

In a case of so much importance as this, and being tried without a jury, I have deemed it proper and due to myself to submit the following suggestions concern-

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ing the conclusions of fact found, before proceeding to consider the questions of law arising thereon.

This action has been tried upon the assumption, that Douglas is equally liable with McDowell, for the arrest of the plaintiff. Granting this, his liability cannot be extended beyond the time when he delivered him to the provost marshal in San Francisco. The imprisonment, so far as Douglas is concerned, then terminated. He did no further act in the premises, and he had no authority over those who did, nor is he in any sense responsible for what happened to the plaintiff thereafter. If the plaintiff had been killed by the guard while at Alcatraz, the defendant, Douglas, could as well be held liable for it, as for the imprisonment which the plaintiff suffered there. *Q* But I am not satisfied that Douglas ought to be held liable to the plaintiff at all. He acted not as a volunteer, but as a subordinate in obedience to the order of his superior. Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto. *b* If Douglas is liable to the plaintiff, so is every private soldier who constituted his guard from Potter Valley to San Francisco, and even the almost unconscious sentry who stood guard at the prison of Alcatraz. Yet there was no alternative for either Douglas or these soldiers, but to do as they did, or refuse obedience to their lawful superiors, in a matter of which they were incapable of judging correctly, at the peril of disgrace and punishment to themselves. *c* The first duty of a soldier is obedience, and without this there can be neither discipline

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nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions. *d*

C In *Martin v. Mott*, 12 *Wheat.* 19, a question arose as to whether the president had authority to call out the militia in a particular exigency. A drafted militia man had refused to be mustered into the service of the United States, because, as he alleged, the president had made the order in a case not contemplated by the act of Congress under which he professed to act. The supreme court held, "that the authority to decide whether the exigency had arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons." The reasoning of the court in support of this conclusion is peculiarly in point upon this branch of the case at bar : *d*

"The power itself is to be exercised upon sudden emergencies, upon great occasions of State, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to a complete attainment of the object. The service is a military service, and the command of a military nature ; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If a superior officer has a right to contest the orders of the president upon his own doubts as to the exigency hav-

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ing arisen, it must be equally the right of every inferior officer and soldier ; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to re-establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the president might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of State, which the public interest, and even safety, might imperiously demand to be kept in concealment."

The difference between that case and this is, that there the legality of the order depended mainly upon a question of fact, while here it depends upon a question of law. But the reasoning of the court is equally applicable to both, for the same disasters and disorders may be expected, if subordinates and soldiers are allowed to disobey the orders of their superiors upon a difference of opinion upon a question of law. Again, how often would this difference of opinion be a mere pretext to escape the demands of duty ? In the war of 1812, the *constitutional scruples* of the militia men, as to the power of the president to order them out of the United States, led to their refusing to march across the Canada line to the aid of the regulars, when the latter were seriously engaged with the enemy, and thus a well planned enterprise failed, with serious loss to the American forces.

Nor is it necessary to the ends of justice that the subordinate or soldier should be responsible for obedience to the illegal order of a superior. In any case, the party injured can have but one satisfaction, and that may and should be obtained from the really responsible

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party—the officer who gave the illegal order. I am aware that in civil life the rule is well settled otherwise, and that a person committing an illegal act cannot justify his conduct upon the ground of a command from another. But the circumstances of the two cases are entirely different. In the latter case, the party giving the command and the one obeying it are equal in the eye of the law. The latter does not act upon compulsion. He is a free agent, and at liberty to exercise his judgment in the premises.

Personal responsibility should be commensurate with freedom of action—to do or refrain from doing. For acts done under what is deemed compulsion or duress, the law holds no one liable. In contemplation of law, the wife is under the power and authority of the husband. Therefore, for even criminal acts, when done in the presence of the latter, she is not held responsible. The law presumes that she acted under coercion of her husband, and excuses her.

If the law excuses the wife on the presumption of coercion, for what reason should it refuse a like protection to the subordinate and soldier when acting in obedience to the command of his lawful superior? The latter may be said to act—particularly in time of war—under actual coercion. As a matter of abstract law, it may be admitted, that ultimately the law will justify a refusal to obey an illegal order. But this involves litigation and controversy alike injurious to the best interests of the inferior, and the efficiency of the public service. The certain vexation and annoyance, together with the risk of professional disgrace and punishment which usually attend the disobedience of orders by an inferior, may safely be deemed sufficient to constrain his judgment and action, and to excuse him for yielding obedience to those upon whom the law has devolved both the duty and responsibility of controlling his conduct in the premises. True, cases can be imagined,

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where the order is so palpably atrocious as well as illegal, that one must instinctively feel that it ought not to be obeyed, by whomever given. But there is no rule without its exception. This one is practical and just, and the possibility of extreme cases ought not to prevent its recognition and application by the courts.

Between an order plainly legal and one palpably otherwise—particularly in time of war—there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which it cannot be expected that the inferior is informed or advised. In such cases, justice to the subordinate demands, and the necessities and efficiency of the public service require, that the order of the superior should protect the inferior ; leaving the responsibility to rest where it properly belongs—upon the officer who gave the command.

The all important question in this case yet remains to be considered.

The defendants maintain that the acts complained of in this action are within the purview of the act of Congress, entitled “An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases,” approved March 3, 1863, and the act supplementary thereof, approved May 11, 1866, and that these acts furnish a complete defense to this action.

On the other hand, it is contended for the plaintiff, that the acts of the defendants are not within the purview of these statutes, and that each of said statutes, in so far as they purport to indemnify officers and soldiers for an arrest or imprisonment made during the suspension of the *habeas corpus*, by the president in pursuance thereof, is unconstitutional and therefore void.

A question of greater importance, both to the government and the citizen—to the maintenance of the authority of the people on the one hand, and the preservation of individual liberty on the other,—was proba-

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bly never submitted to the determination of a court. Without further apology or preface, and without fear, favor, or affection, I proceed to examine and decide it.

The Constitution, Art. I. § ix. subd. 2, declares :

“The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public service may require it.” And also (Art. I. § viii. subd. 19), that : “The Congress shall have power, . . . to make *all laws which shall be necessary and proper* for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

By section 1 of the act of March 3, 1863, Congress authorized the president, during the rebellion, “to suspend the privilege of the writ of *habeas corpus* in any case, throughout the United States or any part thereof.” The constitutionality of the section must be admitted without argument. The clause of the constitution first quoted is a recognition of this power in Congress, as well as a limitation upon its exercise, to the occasions, “when,” by reason of the existence of “rebellion or invasion, the public service may require it.” When the occasion arises—a rebellion or invasion—whether “the public service” requires the suspension of the writ or not, is confided to the judgment of Congress, and their action in the premises is conclusive upon all courts and persons. *Exp. Merryman*, 9 *Am. Law Reg.* 527; 2 *Story Const.* § 1342. In the exercise of this power, Congress may suspend the writ generally, or may limit the suspension to particular cases. They may suspend the writ directly, or commit the matter, within the properly described limits, to the judgment of the president.

Section 4 of the act of March 3, 1863, enacts : “That any order of the president, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any

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action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress ; and such defense may be made by special plea or under the general issue."

On September 15, 1863, the president, in pursuance of the authority conferred upon him by section 1 of the act of March 3, 1863, issued a proclamation, wherein it was declared that "the public safety does require that the privilege of the said writ" (of *habeas corpus*) "shall now be suspended throughout the United States in the cases where, by the authority of the president of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in or belonging to the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law or the rules and articles of war or the rules or regulations prescribed for the military or naval services by authority of the president of the United States, or for resisting a draft, or for any other offense against the military or naval service :

"Now, therefore, I, ABRAHAM LINCOLN, President of the United States, do hereby proclaim and make known to all whom it may concern, that the privilege of the writ of *habeas corpus* is suspended throughout the United States, *in the several cases before mentioned*, and that this suspension will continue throughout the duration of the said rebellion, or until this proclamation shall, by a subsequent one to be issued by the President of the United States, be modified or revoked."

Section 1 of the act of May 11, 1866, enacts: "That any search, seizure, arrest, or imprisonment made, or

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any acts done or omitted to be done during the said rebellion, by any officer or person, under and by virtue of any order, written or verbal, general or special, issued by the president or secretary of war, or by any military officer of the United States holding the command of the department, district, or place within which such seizure, search, arrest or imprisonment was made, done or committed, or any acts were so done, or omitted to be done, either by the person or officer to whom the order was addressed, or for whom it was intended, or by any other person aiding or assisting him therein, shall be held, and are hereby declared, to come within the purview of the act to which this is amendatory, and within the purview of the fourth . . . section of the said act of March 3, 1863, for all the purposes of defense . . . provided therein. But no such order shall, by force of this act, or the act to which this is an amendment, be a defense to any suit or action for any act done or omitted to be done after the passage of this act."

Admitting the constitutional power of Congress to suspend the privilege of the writ of *habeas corpus*, as was done by the act of March 3, 1863, can they in any case go further, and pass acts to indemnify or protect persons, who without legal cause or warrant, have been instrumental in imprisoning others, during such suspension ?

Before answering this question, it is well to consider what is the purpose and practical effect of suspending the privilege of the writ. Personal liberty, unless forfeited by due course of law, is the right of every citizen of the republic. The writ of *habeas corpus* is the remedy by which a party is enabled to obtain deliverance from a false imprisonment. Ordinarily, every one imprisoned without legal cause or warrant is entitled to this remedy—this privilege. The power to suspend this privilege includes, and is in fact identical, with the

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power to take away or withhold this remedy from the individual during the period of such suspension. The suspension of the privilege of the writ and the denial of the remedy for false imprisonment are identical in effect, if not in terms. It follows that the power of Congress to suspend the privilege of the writ of *habeas corpus* is equivalent to the power to take away from all persons, during the suspension, the right to the ordinary and only remedy for deliverance from false imprisonment. This is the effect of the suspension. What is the purpose of it—the object to be accomplished by it? The *occasion* and *necessity* to which the constitution limits the power of suspension clearly denote the purpose and end for which the suspension is made. The *occasion* is the existence of “rebellion or invasion,” and the *necessity* is the fact that “the public service”—safety, requires it. The public safety is the end to be secured or obtained by the suspension. The danger to the public safety arises from the “rebellion or invasion;” and the writ is suspended to enable the executive to prevent harm to the republic from those who are or may be suspected of assisting the cause of the “rebellion or invasion.” The suspension enables the executive, without interference from the courts or the law, to arrest and imprison persons against whom no legal crime can be proved, but who may, nevertheless, be effectively engaged in forming the rebellion or inviting the invasion, to the imminent danger of the public safety.

Plainly expressed, the suspension of the privilege of the writ is an express permission and direction from Congress to the executive, to arrest and imprison all persons for the time being, whom he has reason to believe or suspect of intention or conduct, in relation to the rebellion or invasion, which is or may be dangerous to the common weal.

That at the time of the formation and adoption of

the constitution, such was the understanding, as to the purpose and practical effect of suspending the privilege of the writ, is apparent from the elementary common law treatises of the time. BLACKSTONE, in his *Commentaries*, b. 3, p. 136, says: "Of great importance to the public is this personal liberty ; for if once it were left in the power of any, the highest magistrate, to imprison arbitrarily whoever he or his officers thought proper (as in France it is daily practiced by the crown), there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom ; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. *And yet sometimes, when the State is in great danger, even this may be a necessary measure.* But the happiness of our constitution, is that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient ; *for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown by suspending the habeas corpus act for a short and limited term, to imprison suspected persons without giving any reason for so doing,* as the Senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. . . . In like manner, this experiment ought only to be tried in cases of extreme emer-

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gency ; and in these the nation parts with its liberty for a while, in order to preserve it forever."

It is evident, from the language of this passage, that the commentator was not disposed to undervalue the importance of personal liberty, nor to overstate the purpose and practical effect of the suspension of the *habeas corpus* act.

At the era of the constitution, this was the acknowledged doctrine of the common law concerning personal liberty and the suspension of the privilege of the writ, whereby that liberty was left at the discretion of the government for the time being. The provision in our constitution was adopted with that understanding of its effect. It in no wise changed the common law as laid down by BLACKSTONE, except that, instead of leaving Congress at liberty to suspend the privilege "whenever it sees proper," it limited and confined the exercise of such power to times of "rebellion and invasion."

This is also evident, from the nature of things. If the suspension of the privilege of the writ is not intended to authorize and permit arrests without the ordinary legal cause or warrant, for what is it intended ? The very limitation in the constitution upon the power of suspension is strong evidence that it was not understood to be a mere form, but something of serious import and effect. An arrest upon a warrant describing an offense defined by law, can be made and maintained, with the privilege of the writ in force. Unless the suspension changes the law, so to speak, for the time being, in regard to arrests and imprisonments, I am at a loss to conceive how the republic can be thereby preserved from imminent danger, or the public safety conserved. The powers granted to Congress must be construed and applied with reference to the purposes for which the constitution was made. It is not a mere abstraction to sharpen men's wits upon, but a practical scheme of a government, having all necessary power to

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maintain its existence and authority during peace and war, rebellion or invasion. As was well said long ago, "The instrument was not intended as a thesis for the logician to exercise his ingenuity on. It ought to be construed with plain good sense. The uniform sense of Congress and the country furnishes better evidence of the true interpretation of the constitution than the most refined and subtle arguments."

The purpose of the *express* power to suspend the privilege of the writ of *habeas corpus*—the object to be obtained being to authorize, for the time being, the imprisonment of persons "without giving any reason for so doing," and without legal cause or warrant, as a means of preserving the republic from imminent danger, it follows as a necessary consequence, that, under the clause giving power "to make all laws which shall be necessary and proper for carrying into execution" the power of suspension, Congress may pass any law necessary and proper to secure or obtain this end, unless expressly prohibited therefrom by the constitution itself.

Without further legislation than the suspension of the privilege of the writ, every person imprisoned without legal cause or warrant, might maintain an action for damages therefor. To enable the power of suspension to be executed—the purpose of it to be accomplished—it becomes *necessary* to provide in some way for the protection of the officers and persons required to make arrests and imprisonments. To accomplish this, Congress has passed the indemnity clauses in the acts of March 3, 1863, and May 11, 1866, being section 4 of the one act and section 1 of the other. Were these provisions in these acts *necessary* and *proper* means to secure the end in question? Let the supreme court answer the question. In *McCullough v. State of Maryland*, Chief Justice MARSHALL says: "The subject is the execution of those great powers on which the wel-

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fare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding *the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.* This provision is made in a constitution intended to endure for ages to come, and consequently to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." 4 *Wheat.* 415. And again :

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution *must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution*, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the*

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letter and spirit of the constitution, are constitutional." *Id.* 421.

It is not necessary to repeat what has been said to show the legitimacy of the end proposed by Congress in this legislation. Waiving the question of the propriety of the means for the moment, if this end is not legitimate, then the clause in the constitution authorizing the suspension of the privilege of the writ is merely nugatory, and the power might as well have been absolutely denied.

As has been shown, the power to suspend the *habeas corpus*, in the cases specified, being practically the power to authorize and provide for the imprisonment of persons for the time being without legal cause or warrant, and "without giving any reason for so doing," it must follow, that to secure this end, Congress must have power to protect or indemnify the officers and persons whom, mediately or immediately, it thus requires to do any act concerning such imprisonments.

The argument for the plaintiff may be briefly stated thus: "The suspension of the writ 'creates a despotism,' and therefore the end is not legitimate." Let it be admitted, for the purposes of argument, that the suspension does "create a despotism." What then? Does the conclusion follow? By no means; because, as we have seen, the constitution expressly authorizes the suspension, and history teaches, and so the fathers understood it, that such suspension was allowed, so as to authorize and permit imprisonments without the ordinary cause or process, for the safety of the republic.

Such an argument might have been proper as against the adoption of the constitution by the people, but in a court which must recognize that instrument—the suspending clause inclusive—as the supreme law of the land, it becomes a mere waste of opprobrious epithets.

Nor does this power as now construed merit such

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epithets. A despotism in any sense or form always implies the idea of *irresponsible* as well as unlimited power. The people of the United States made this constitution for themselves, and can change it when they will, to suit their altered condition or change of opinions. While yielding obedience to their government, exercising the powers conferred by that instrument, whether ordinary or extraordinary, they cannot be said to be living under a despotism. When their representatives in Congress assembled, suspended the privilege of the writ of *habeas corpus* for the public safety, they only exercised a delegated power, for the proper use of which they are responsible to their constituents at short intervals. To call such a state of things a despotism is an abuse of language and a confusion of ideas. At most, it is but a voluntary and temporary surrender *by the people* of the ordinary safeguards of personal liberty in an "extreme emergency," whereby, as BLACKSTONE says, "the nation parts with its liberty for a while, *in order to preserve it forever.*"

As a means to secure the purpose and practical end of suspending the privilege of this writ, does the constitution anywhere prohibit Congress from passing the laws in question? He who asserts that it does, must show it. I have been unable to find such a provision, and the counsel for the plaintiff, notwithstanding his learning and zeal, has failed to point it out.

It is not enough to show that the constitution prohibits unreasonable searches and seizures, and the issuing of warrants without probable cause, supported by oath or affirmation. These provisions of the constitution are qualified by the express power to suspend the privilege of the writ. The former furnish the general rule, while the latter takes effect in the excepted case of public danger in time of rebellion or invasion.

But these indemnity laws do not conflict with the constitution in any of these provisions. They do not

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authorize any imprisonment with or without cause, but are enacted to protect an officer or person from an action for damages, on account of acts done in the defense of the public safety during the suspension of the writ, for imprisonments already made in pursuance of a law authorized by the constitution.

It is admitted that the legislature of a State, by virtue of its general legislative power, unless specially prohibited therefrom, could pass laws barring the right of any of its citizens to maintain an action for an alleged assault and battery or false imprisonment. In the choice of means to carry out an express power, as the suspension of the writ, Congress may also exercise its discretion, and adopt any measure not specially prohibited by the constitution. These means are necessarily the passage of laws, and one of the most appropriate for the purpose is to provide that the officer shall not be liable to an action. Another, and probably the only other, is to provide by law for the payment out of the public treasury of all judgments that may be recovered against officers by reason of any act done by them pending the suspension of the writ, and in pursuance of the law authorizing or providing for such suspension. But Congress may adopt either of these means, as they may deem best. The constitution commits the choice of means to them, and their decision in that respect is conclusive. In England, as I am advised, it has always been the practice to pass indemnifying acts to protect the executive officers from actions for damages, on occasion of suspending the *habeas corpus* act. 1 *Wend. Black.* 137, n.

But I am inclined to put the decision of this question upon higher and simpler grounds. It appears to me that these acts of Congress are merely declaratory of the law, as it resulted from the passage of the act suspending the privilege of the writ, and therefore necessarily constitutional. The suspension being the

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virtual authorization of arrest without the ordinary legal cause or warrant, it follows that such arrests, pending the suspension, and when made in obedience to the order or authority of the officer to whom that power is committed, are practically legal. They are made in pursuance of law—the law suspending the privilege of the writ. The municipal law declares in advance that homicide is justifiable when committed by an officer in obedience to the judgment of a competent court. In the absence of such a statute provision, what court would hold that such a homicide was illegal and criminal? It seems to result from the nature of things, that what the law commands or permits, so far as the law is concerned, is legal and justifiable.

It only remains to determine whether the defendants are within the provision of the indemnifying acts. If they are, judgment must be given in bar of the action, and if not it must go against them for the damages found.

Section 4 of the act of March 3, 1863, makes any *order or authority of the president*, made at any time during the existence of the present rebellion, a defense to any action for arrest and imprisonment, made *under and by virtue of such order*.

In the case at bar, no authority or order of the president is shown for the imprisonment of the plaintiff. It is the *order or authority of the president* which the act makes a defense to the action. Such order or authority cannot be presumed, but must be proved.

Counsel for the defendants seek to invoke the proclamation of September 24, 1862, in aid of the defendants in this respect. It may be admitted generally that a proclamation by the president is an order or authority to all whom it may concern or to whom it may be addressed. Is this proclamation within the act of March 3, 1863?

The act declares that "any order of the president

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. . . made at any time during the existence of the present rebellion, shall be a defense, etc.” Does this include orders made during the existence of the rebellion—as the proclamation of September 24, 1862—but prior to the date of the enactment? It must be admitted that the language of the statute, taken literally, is broad enough for that purpose. But I do not think it was so intended or should be so construed, and for this reason: Congress was by that act first authorizing the suspension of the privilege of the writ of *habeas corpus*. It was only as an appropriate means to this end that Congress could have made such orders a defense to an action for imprisonment. Where an act of Congress is equally susceptible of two constructions, the court is bound to adopt that one which will make the act harmonize with the constitution.

But, if I am mistaken in this, there is another answer to the proposition that the proclamation is a defense to the action. That proclamation professes to suspend the writ of *habeas corpus* and to declare martial law. The expression *martial law* may be passed over as merely cumulative. It means nothing but the absence of law. But the president of the United States has no authority to suspend the privilege of the writ, except as authorized and directed by Congress, and at the date of this proclamation no such authority existed. I do not propose to argue the question. There are some things too plain for argument, and one of these is, that by the constitution of the United States the president has not the power to suspend the privilege of the writ, and that Congress has. The power of the president is executive power—a power to execute the laws, but not to suspend them. The latter is a legislative function, and so far as it exists, belongs naturally and by force of the constitution exclusively to Congress. See opinion of Chief Justice TANAY, in *Exp. Merryman*, and authorities there cited; 9 *Am. Law Reg.* 524.

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Whatever may have been the public necessities and motives which led the president to issue this proclamation—and I neither question nor impugn them—I cannot hold that it constitutes a defense to this action, because judicially I know that it was unauthorized and void.

Except as a means to secure the end and purpose of suspending the writ, Congress itself could not have authorized the president to make this proclamation, nor do I think they could afterwards sanction it, so as to make it operate as a defense in a private action for an imprisonment made under it.

What is now said applies only to this action or similar ones. The proclamation of September 24, 1862, embraces many subjects and classes of persons. As to some of them or many of them, the president may have been authorized as commander-in-chief of the army and navy, to make the orders and directions therein. It declared that all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States, shall be "subject to martial law and liable to trial and punishment by courts martial or military commissions." "The writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any court martial or military commission."

But if it were admitted that this proclamation was authorized by law, and that it contained sufficient matter to justify the defendant McDowell in causing the arrest of the plaintiff as he did, still I do not think it would be a defense to this action, because long before this arrest, it was superseded and practically revoked

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by the proclamation of September 15, 1863—the one authorized by the act of March 3, 1863.

The latter carefully defines the class of persons in relation to which the privilege of the writ was thereby suspended, and who might therefore be arrested and imprisoned without legal warrant or cause. In the absence of particular proof the only general order that the court can take judicial notice of is the proclamation of September 15, 1863. In this I do not find any order directing the arrest of the plaintiff, or that would justify his arrest. It is true that the proclamation suspends the writ as to “aiders and abettors of the enemy.” And it is apparent that this language was intended to apply to and include a class of persons whose conduct fell short of that “aid and comfort” to the enemy, which the constitution declares to be treason, and which is legally punishable as such.

It is this class of persons that the suspension of the writ is intended to bring within the power of arbitrary arrest for the time being—persons who may be reasonably suspected of complicity with the rebellion or invasion, or who may be known to give it that moral aid and support which is often more effectual than a soldier in arms, particularly in a country governed by public opinion. But while the proclamation suspends the privilege of the writ as to such “aiders and abettors” as a class, does it authorize or order any officer, military or civil, to arrest and imprison any particular person whom *he may believe* to be such an “aider or abettor,” without the special and further order or authority of the president for so doing? I think not.

The language of the proclamation is, that, “in the judgment of the president, the public safety does require that the privilege of the said writ shall be suspended throughout the United States in the cases where *by the authority of the president of the United States*, military, naval, and civil officers of the United States, or

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any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, etc." This proclamation is in the nature of a law—it has the force of a law—and by it an important provision of the constitution is suspended. It should then be construed and treated as a law—a rule of action. It prescribes the limits within which the writ shall be suspended. As to any of the persons included within these limits, when in the custody of an officer of the United States, *by the authority of the president*, the privilege of the writ is taken away. But I do not see how a person can be said to be in the custody of an officer by authority of the president, unless the latter has directed or ordered the officer to take him into custody or to keep him in custody after having been arrested in any way. I admit that there is some room for argument upon the language of the proclamation, as to whether the instrument itself is to be construed as a general order to every officer of the United States, military, naval, and civil, high or low, great or small, to arrest and imprison whomsoever they may *believe* to be "aiders and abettors of the enemy," or merely a declaration in advance, that whenever such a person is arrested or kept in custody by such officer, upon the order of the president—not the order of the subordinate—that as to him the privilege of the writ is suspended. But I think the latter construction altogether the most reasonable, and in accordance with the general spirit and purpose of the instrument. So upon general considerations outside of the language of the proclamation, there are many cogent reasons why it should be thus construed and applied. The power of arbitrary arrest and imprisonment, though sometimes absolutely necessary to the public safety, is a dangerous and delicate one. In the hands of improper persons it would be liable to great abuse. If every officer in the United States, during the suspen-

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sion of the *habeas corpus*, is authorized to arrest and imprison whom he will, as "aiders and abettors of the enemy," without further orders from the president, or those to whom he has specially committed such authority, the state of things that would follow can be better imagined than expressed.

It only remains to consider what is the effect of section 1 of the act of May 11, 1866. That act, as we have seen, makes the order of "the president or secretary of war," or of "any military officer of the United States holding the command of the department, district, or place within which" an "arrest or imprisonment was made," a defense to the action.

Under this section there can be no doubt but that the order of General McDowell to Captain Douglas protects the latter for acting in obedience to it, and is a complete defense to the action, so far as he is concerned.

At the same time it is equally apparent that it does not furnish a defense for General McDowell. He is not shown to have acted upon the order of any one. The section proceeds upon the principle, which I have already attempted to show ought to be the law independent of the statute, that a military officer, when acting in obedience to the order of his superior, should not be liable to these persons therefor.

As it nowhere appears that General McDowell was acting under the order of his superior, but rather in obedience to what was deemed public necessity, I must hold him liable to the plaintiff for the damages which the latter has sustained by reason of his unauthorized act.

The good motives of General McDowell, and the necessities of the public, when he issued Order No. 27, as well as the gross misconduct of the plaintiff, have been duly considered by the court in estimating the damages of the plaintiff. But these alone, however

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worthy or imperative, do not constitute a defense to the action. The act itself being unauthorized by any order or authority of the president, does not come within the scope of the proclamation of September 15, 1863, suspending the privilege of the writ, or the act of March 3, 1863, authorizing such suspension. Neither does it come within the province of the act of May 11, 1866, as it was not done in obedience to the order of a superior.

Congress may relieve a meritorious officer against a loss incurred while in the discharge of his duty to the public; but in this tribunal, whose only function is to administer the law, the defendant must be held liable for the legal consequences of his act.

The Finding.—This cause being tried by the court without the intervention of a jury, in pursuance of the stipulation of the parties heretofore filed, the court now finds the facts to be as follows :

First. That on June 1, 1865, the defendant, Charles D. Douglas, was a captain in the army of the United States, then serving in the State of California, and that such defendant, as such captain, was then acting as commander at a military post, called Fort Wright, in the county of Mendocino, and State aforesaid.

Second. That on the day and year aforesaid, at Potter Valley, in the day time, on the public highway, in the county and State aforesaid, the defendant Douglas did order and cause the arrest and imprisonment of the plaintiff, John McCall, for the space of thirteen days; and that said defendant during the term of said imprisonment, did convey and transport the said plaintiff, in close custody, under a military guard, by the usual means of transportation, by land and sea, to the city of San Francisco, in the State aforesaid, a distance of one hundred and fifty miles.

Third. That the defendant, Douglas, on June 13, 1865, at San Francisco aforesaid, did deliver the plaintiff into the custody of the provost marshal of the Uni-

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ted States, where his hands were confined and manacled, and from whence the said plaintiff was, by order of said provost marshal, transported in close custody, under a military guard, to a military post and fort, called Fort Alcatraz, situate upon Alcatraz Island, in the county of San Francisco, and State aforesaid.

Fourth. That said plaintiff was kept a prisoner in close custody, without manacles, under a military guard, in said Fort Alcatraz, for the space of six days, and during such imprisonment was compelled and required by the persons having him in custody at said Fort Alcatraz to perform manual labor, in common with prisoners belonging to the military forces of the United States then confined at said fort, as a punishment for military offenses.

Fifth. That during the years 1864 and 1865 the defendant, Irvin McDowell, was a brigadier-general in the regular army of the United States and a major-general of volunteers in the military service of the United States; and that during such years such defendant was the commander of the military department of the United States, known as the Department of the Pacific, which department included the States of California, Oregon, and Nevada and the Territory of Washington, and that said State of California was a separate district of said department, and under the immediate supervision of a district commander—General Wright.

Sixth. That on April 17, 1865, the defendant, McDowell, caused to be issued the following order:

“HEADQUARTERS DEPARTMENT OF THE PACIFIC, }
San Francisco, Cal., April 17, 1865. }

“GENERAL ORDER, No. 27.

“It has come to the knowledge of the major-general commanding that there have been found within the department, persons so utterly infamous as to exult over the assassination of the president. Such persons be-

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come virtually accessories after the fact, and will at once be arrested by any officer or provost marshal or member of the police having knowledge of the case.

"Any paper so offending or expressing any sympathy in any way whatever with the act, will be at once seized and suppressed.

"By command of Major-General McDowell.

"R. C. DRUM, Assist. Adj. General."

Seventh. That at the date of such General Order No. 27, the populace of San Francisco was in a highly excited and tumultuous condition, on account of the assassination therein referred to, and had already proceeded to commit acts of violence upon the property of persons known to sympathize or suspected of sympathizing with the then existing rebellion by the "Confederate States," against the United States, and still threatened in large numbers and with imposing force to continue such violence against both the persons and property of such sympathizers. That it seemed highly probable that such excitement and disorder would extend throughout the department, and result in unlawful strife and violence, destructive to the lives and property of the people, unless the military authority (which alone possessed the physical power) should summarily interfere to remove and restrain persons who should make themselves obnoxious to the popular sentiment by such exultations ; and that such order was made and issued by the defendant, McDowell, reluctantly, and at the solicitation and upon the urgent request and advice of prominent and responsible citizens of San Francisco, for the reasons and causes above stated, as a means of preventing popular tumult and violence, and of preserving the public peace and order, and not from any desire or purpose upon the part of the defendant, McDowell, to molest, injure, or oppress the plaintiff herein, or any other person, and

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without any malice or ill will towards the said plaintiff, or any other person whomsoever.

Eighth. That during the progress and existence of the rebellion aforesaid, and at the date of Order No. 27, it had been and was deemed necessary by the proper authorities, to maintain and keep an organized military force throughout such department, to discourage and prevent acts of hostility therein, against the authority and power of the United States, and in aid of the rebellion aforesaid ; and that the defendant, McDowell, when he issued Order No. 27, as aforesaid, had good reason to believe, and did believe that the peace and security of the department aforesaid would be seriously endangered, unless public disturbances, growing out of the conflicting sympathies and antipathies engendered by the rebellion aforesaid and the war for its suppression, were prevented or promptly put down, and all causes or pretexts therefor removed.

Ninth. That the plaintiff herein was a native born American citizen, and that during the month of April, 1865, and prior thereto, and at the date of the arrest aforesaid, was a resident of Potter Valley aforesaid, and was then and there engaged in farming and stock rearing, and that said plaintiff, on the public highway, in the day time, at Potter Valley aforesaid, on April 20, 1865, did publicly declare and say—"That Lincoln (thereby meaning the late president of the United States) was shot, and that the damned old son of a bitch should have been shot long ago, and that some more of his kind would go the same way shortly." And that the said plaintiff on the public highway, in the day time, at Potter Valley aforesaid, on April 29, 1865, did publicly declare and say : "That he did not believe that General Lee had surrendered, and believed that General Lee was still carrying on the war ; and that he did not believe for a long time after hearing of the president's assassination that it was true ; and said, I am

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only afraid that it is not so—if three or four more of the leaders of the abolition party were killed it would be a good thing, as it would be the downfall of that party.”

Tenth. That the defendant, Douglas, arrested and imprisoned the plaintiff, as above stated, in obedience to General Order No. 27, aforesaid ; and because, before making such arrest, the said defendant had information upon oath that the plaintiff herein had uttered the words above mentioned, as spoken by him on April 29, 1865 ; and also that said defendant had information upon oath, upon the day of making such arrest, but some hours thereafter, that the plaintiff herein had uttered the words above mentioned, as spoken by him on April 20, 1865 ; and not from any desire or purpose upon the part of the said defendant, Douglas, to molest, injure, or oppress the plaintiff herein, and without any malice or ill will towards the said plaintiff whatever.

Eleventh. That the defendant, McDowell, did not procure, advise, or cause the arrest, imprisonment, or detention of the plaintiff, otherwise than as above stated ; and that said defendant subsequently issued an order, in obedience to which the said plaintiff was removed and discharged from Fort Alcatraz, as above stated, and turned over to the civil authority, to wit, the United States marshal for the district of California, and that said plaintiff was then and there by said marshal taken before the district court of the United States for the district aforesaid, when and where said plaintiff was, by the order of said court, set at liberty, he first taking the oath of allegiance to the United States government, as by act of Congress provided, entitled, “ An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases,” approved March 3, 1863.

Twelfth. That the plaintiff during his arrest and imprisonment as aforesaid, and on account thereof, was obliged to expend the sum of one hundred and ten dol-

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lars in money, of which said sum he paid twenty-five dollars to an attorney for services rendered to him in and about the matter of his discharge from such imprisonment ; and that the said plaintiff did not sustain any special injury to his person or property by reason of such arrest and imprisonment.

Thirteenth. That for and on account of the loss of time and absence from home caused to the plaintiff by reason of such arrest and imprisonment, and for aid on account of the injury to his feelings and the bodily suffering and anxiety of mind necessarily resulting therefrom, the court assesses the damages of the plaintiff, in addition to the sum above mentioned, at the sum of five hundred dollars.

And the court finds, as a conclusion of law from the premises, that the defendant, Douglas, is not liable to the plaintiff as he hath complained against him, and that such defendant is entitled to judgment against the plaintiff in bar of this action, and for his costs and expenses in this behalf sustained. And the court further finds, as aforesaid, that the defendant, Irvin McDowell, is liable to the plaintiff as he hath complained against him, and that the plaintiff is entitled to have judgment against said last named defendant for the sum of six hundred and thirty-five dollars damages, and his costs and expenses in this behalf sustained.

Judgment accordingly.

[Afterwards a motion for a new trial was argued before Justice FIELD and Judge HOFFMAN ; and was denied.]

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AVERY v. FOX.

*Circuit Court, Sixth Circuit; Western District of
Michigan, January T., 1868.*

NAVIGABLE STREAMS.—INJUNCTION.

The owner of land bordering upon a stream, although navigable, in which the tide does not ebb and flow, is presumed to be the owner of the land beneath the water to the center line of the stream.

Such riparian proprietor has also a right to use the water of the stream, in its flow, in any manner not inconsistent with the rights of others in it.

But the public have the right to use all navigable streams as highways; and the owner of the bed of such a stream has no right, as such, in the waters thereof, which can authorize him to impede or obstruct navigation upon it. The right of the public, for purposes of navigation, is paramount to that of the riparian proprietor.

The government of a State may authorize alterations to be made in the course, width, &c., of navigable streams, with a view to afford greater facilities for navigation; and for this purpose may take the property of a riparian owner, upon complying with the constitutional requirement to make compensation therefor.

The government of the United States may authorize similar alterations in navigable streams, for the purpose of affording increased facilities for navigation between the States; and for this purpose may take the property of a riparian owner. But they can only take such property upon making or providing for just compensation.

If an alteration in the course of a stream, by diverting it from its natural channel to an artificial one, for the purpose of improving navigation, results in depriving the riparian owner of the use of the stream which he is employing advantageously as an incident to his land, this is taking the private property of such owner, in the use of the water, for a public use; and he is entitled to compensation.

Although the courts cannot directly restrain the government of the United States, nor the action of the president as the executive power, nor that of Congress as the legislative department; yet when Congress makes an appropriation for a public improvement, and com-

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mits the execution of the work and the expenditure of the money to one of the departments, which in turn employs agents to carry forward the work, neither such department nor its agents will be exempt from the restraining power of the courts, if either seek to execute the law in an unconstitutional manner;—as, by taking private property against the consent of the owner and without compensation.

Private property cannot be taken for public use until compensation is actually made. It is not enough that a provision is made by law for ascertaining and making compensation afterwards.

Motion for a preliminary injunction.

C. A. Kent and *C. J. Walker*, for the motion.

E. S. Eggleston and *L. Patterson*, opposed.

WITHEY, J.—The bill in this case is for an injunction against defendants, contractors and employees in constructing a new channel from White Lake into Lake Michigan. Based on bill and affidavit, a motion is made for a temporary injunction to restrain defendants from proceeding with the work.

It appears from the bill that White Lake is four miles long and one mile wide; that with a commodious channel for entrance, this lake would afford one of the best harbors on Lake Michigan. White Lake is separated from Lake Michigan by a strip of land about fifty rods in width. White River empties into White Lake, is for a distance of about five miles, immediately above the lake, a stream from one hundred to two hundred feet wide, from three to eight feet deep, and running from two to three miles per hour. The outlet of White Lake is also called White River, is from seventy-five to two hundred feet in width, and in the channel, generally, from four to ten feet deep, and runs from the western part of the lake northwesterly, parallel with the strip of land between the two lakes, about three-quar-

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ters of a mile. It then turns west and runs forty to fifty rods to Lake Michigan.

Westerly winds blow sand from said strip of land into the outlet, so that the channel is kept in a navigable condition only *by the action of the current and by large expenditure annually of money in removing* such deposited sand.

Complainants own seventy acres of land lying on the outlet, on which is a steam saw mill and other buildings and improvements, the value of which is not less than fifty thousand dollars. They also own lumber lands up the White River, and are accustomed to supply their mill with logs through White River, White Lake, and the outlet. There is a bayou near their mill, wherein logs are stored—logs are taken from the bayou through an opening into the outlet to the saw mill as wanted. Complainants have a steam tug which runs between said lakes, aiding in the transportation of logs and lumber. All vessels passing from one lake into the other must go by complainants' property through the outlet. They also have a pier extending from the mouth of the outlet into Lake Michigan. Their lumber, when sawed, is received by vessels coming from Lake Michigan, at a dock near the mouth of the outlet.

The Congress of the United States has appropriated fifty-seven thousand dollars for the improvement of the harbor at White River, to be expended under the directions of the war department. The war department, through its agents, has caused examinations and surveys to be made with reference to the work of improvement, and regards the improvement of the present outlet as impracticable, and has commenced the work of cutting a new channel through the sand bank or strip of land lying between the two lakes, making a straight cut of two hundred feet in width and twelve feet deep, from deep water in Lake Michigan to deep water in White Lake.

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Complainants claim that the opening of this new channel must result in the rapid closing of the old outlet, because the new channel will be very much wider, deeper, and shorter than the old.

As a natural and necessary consequence, they say, the water of the inner lake must seek the level of Lake Michigan through the new channel; the descent must be more rapid, as the distance is less; its greater depth and width will contribute materially to make the water prefer it to the old channel.

Several legal questions have been presented, involving the rights of riparian proprietors upon the navigable waters of the State; the rights of the public in, and particularly as to the power of the general government to divert or obstruct such streams in making harbors for the convenience and protection of commerce and navigation, and other questions which I shall have occasion hereafter to refer to. Without reference to the other facts of the case as presented by complainants and defendants, as to whether complainants will, by the opening of the proposed new channel, be deprived of enjoyed vested rights to such an extent as to justify the exercise of the restraining power of the court for their protection—I will first pass upon the legal questions that have been urged upon my consideration.

1. The outlet of White Lake is a navigable stream, and the law is too firmly settled to allow of discussion at this day, that the owner of land bordering on a navigable stream, in which the tide does not ebb and flow, owns the land beneath the water to the center thereof. Neither the nation nor State own the beds of navigable streams within the State, but the riparian proprietor is owner thereof. It is equally well settled as law, that a riparian proprietor has a property in the use of water flowing by his premises; that is, a right to use it in its flow, in any manner not inconsistent with the rights of others to its use. If, then, the law recognizes such indi-

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vidual property, or, which is the same thing, individual right, in the use of water flowing past or through the land of a person, can such stream be so far obstructed or diverted as to deprive such owner of the use of the water? Clearly not. If the owner of land adjoining such stream has a mill which obtains its motive power therefrom, the water of such stream cannot be so far obstructed or diverted as to deprive his mill of its motive power, nor so as seriously to diminish the needed power. If the stream be navigable for crafts of any sort, for logs and lumber, and be used for any or all these purposes, any diversion or obstruction of the water accustomed to flow there, which should render navigation either impossible or difficult and more expensive, would be unlawful, and in either case, on a proper showing, should be prevented by injunction.

This right of private persons to the use of water as it flows by or through their lands, in any manner not inconsistent with the public easement, is as sacred as is the right of a person to his land, his house, or his personal property. The public, however, have the right to use such streams as are navigable as highways, and the owner of the bed of a stream has no rights in the water thereof which will permit him to use it to the injury of the public. He cannot so far divert the water to his private use as to render navigation impossible or difficult, nor can he place obstructions in the stream in a manner to produce such results. His right and the right of the public to the use of the water of such streams are to remain unimpaired as far as possible, but the right of the public for purposes of navigation is paramount, and there can be no use of the water by a riparian proprietor inconsistent with the public easement.

The law, as thus understood, does not deprive a State of the right to improve its navigable rivers, nor indeed to permit the damming or bridging of such

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streams, providing navigation is not thereby obstructed, as when suitable locks or draws are provided through which navigation is secured to the public. And so, too, a State, which by its constitution is not prohibited from entering upon works of internal improvement, may cut channels around rapids or carrying places to afford greater facilities for navigation, so as to enable crafts to pass such carrying places which could not be done without, or only in times of high water. In doing so, the State as well as individuals must respect the right of riparian proprietors, and not deprive them of such enjoyed use as they are entitled to have continued in the water, to an extent to produce irreparable injury. Mere inconvenience to the private citizen resulting from any such public improvement may well be ignored for the greater benefit to the public, and be made to give way from principles of public policy.

2. But upon principles of public law, which are recognized in most of the State constitutions, and in the constitution of the United States, private property cannot be taken for public use without making just compensation. The right of eminent domain, which is the right that the people or government retain over the estates of individuals to resume the same for public use, is a right that carries with it the duty to make just compensation to the individual whose property is taken.

3. I now come to the question whether the United States, either from motives of public policy or the power given to Congress by the constitution, to regulate commerce among the States, can lawfully, in the improvement of harbors of national importance and concernment, such as the one at White Lake is conceded to be, change the outlet of the small lakes or mouths of rivers, so as to deprive persons owning lands bordering the same entirely of the use of the water as it naturally flows by or through their lands. The United States have a right to make the cut between White

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Lake and Lake Michigan—the land, where the proposed cut is to be, having first been secured—provided thereby private interests are not seriously impaired or private rights destroyed.

It is an incident to the sovereignty of the United States, and a right recognized in the constitution, in that clause which prohibits the taking of private property without just compensation, that it may take private property for public use—of the necessity or expediency of which Congress must judge, but the obligation to make compensation is concomitant with the right. *Bonaparte v. Camden & Amboy R. R. Co.*, 1 *Baldw.* 220 ; *Dickey v. Maysville, &c. Turnpike Road Co.*, 7 *Dana*, 119. In the last case the court say, “The national power to use the land of a citizen or State for an armory or fortification is undoubted and irresistible ; the constitutional obligation to pay the owner a just equivalent, if it be demanded, is equally undoubted and irresistible.”

The case involved the right to carry the United States mail over the road of a turnpike company without payment of toll, and at page 115 the court say, “The right to use private property for a mail route—as for any other national purpose, being qualified by the constitutional condition that a just compensation be made for the use, unless the owner voluntarily waive it—does not imply an authority to take, or to use for post-office or post-road purposes, the land or the house of a citizen, or the railroad or McAdamized road of associated citizens, without paying to the owner or owners a just compensation.” The principle of that case is directly in point.

The legislature of the State, or the Congress of the United States, possesses whatever power exists in either government to take private property for public use, and to provide compensation. If now the power to take may be exercised alone,—when we find that the law-making power is alone judge of the necessity or expe-

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diency of taking,—there will be found no check to its most arbitrary exercise. And as was said by Chief Justice MARSHALL, in *Fletcher v. Peck*, 6 *Cranch*, 135, if any limits to legislative power be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation ?

To divert a stream from its natural channel into an artificial one, for the purpose of affording improved navigation and benefiting commerce, may be a work of great public concernment and advantage, but if thereby a riparian owner is wholly or injuriously deprived of the use of its waters, which he is employing advantageously as an incident to his land, it is taking the private property of such owner in and to the use of that water for public use, and unless just compensation is made, is against both the principles of the common law and the provisions of the constitution of the United States, and courts have no alternative but to so administer the law as to secure and protect such rights in a proper case.

4. It was urged upon the argument that the United States is prosecuting the White River harbor improvement, and as a sovereign power, cannot be restrained. The United States cannot be brought before the court as a party defendant in the record ; the courts cannot restrain the president of the United States as the executive power of the government, nor Congress, the law-making power ; but when Congress makes an appropriation to improve a harbor, and commits the direction of the work and expenditure of the money appropriated to the war department, which employs its agents to carry forward the work, neither the war department nor its agents will be exempt from the restraining power of the court, if either seek to execute the law in an unconstitutional manner, by taking private property against the consent of the owner, without compensation.

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The war department is not acting as the executive, nor as the agent of the executive power, but ministerially. If the court has jurisdiction of the subject matter and person of the defendants, I know of no rule which would exclude from the process of injunction any person on account of the character or capacity in which he acts, although such character or duty be conferred or imposed upon him by the law of a State or of Congress. 1 *Baldw.* 206.

5. One further question is suggested by the argument and from the considerations which I have given, viz: When is compensation to be made? Or may private property be taken or private rights be impaired before compensation made, if by some law provision is made for ascertaining and making compensation? I regard the just rule to be, that the taking of private property should not be allowed until compensation is actually made, thus imposing on the owner no burthen of seeking or pursuing expensive remedies, and leaving him exposed to no risk or expense in obtaining compensation. 1 *Baldw.* 227.

6. If, then, the facts of this case bring the complainants within the rules of law as indicated in my views already expressed, the work which is being prosecuted by defendants should be prevented by injunction.

I have already stated most of the allegations of the bill in substance. Complainants therein state that the strip of land between the outlet of White Lake and Lake Michigan, is in part a mere sand bank, and westerly winds blow this sand into the river in great quantities, so that the channel *is kept navigable only by the action of the current and by artificial means*. Great expense is necessary every year, on the part of parties interested, to keep the channel clear of the sand which drifts in. They also say that, in their judgment, the opening of the new channel must result in the rapid closing of the old outlet. The wider, straighter, shorter

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and deeper channel proposed will naturally and necessarily result in causing the waters of White Lake to seek the level of Lake Michigan through the new channel. And they say that any diminution of the accustomed supply of water in the present outlet would tend to injure their property, since there is now hardly enough; and that if the current should cease to flow, even though the water should remain as deep as at present, the expense of getting logs from White Lake to the bayou would be seriously increased and the value of their property diminished.

The evidence in support of the bill is the affidavit of Colonel J. D. Webster, who from 1838 to 1854 was an officer of the topographical engineers of the United States army, and for several years had charge of government harbor improvements on Lake Michigan, is familiar with the shores of the lake, has given great attention and reflection to the action of the winds and currents thereof. He states that the effect of the new channel will be that almost the entire water passing from White Lake to Lake Michigan will flow through the new channel, and that there will remain but little or no current in the old channel. That in consequence it will be gradually but surely filled with sand, and within a few years closed for all practical and useful purposes. But this opinion is based upon causes operating in the absence of the use of artificial means to aid this channel by dredging out the sand, as now employed.

He thinks no considerable effect, in keeping the present channel open after the completion of the new, would result from the running back into Lake Michigan of the waters which are by strong westerly winds blown into White Lake.

The defendants, in opposition to the motion for injunction, present three affidavits, no answer having been filed. Colonel J. B. Wheeler, of the United States

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army, who, under instructions from the secretary of war, has charge of the work of constructing the proposed new channel, gives full information as to the surveys for the work, the report to the war department, and among other items, the report says : " It is hardly possible that any reasonable expenditure of money upon this (the present) entrance and portion of the river or outlet would give us a harbor suitable to the wants and necessities of the general commerce on Lake Michigan." And further, in reference to the locality of the proposed new channel, it is said : " By examining this locality we see that there is deep water in both lakes near the shore, and that, there, the distance between the twelve feet waters in each, is only twelve hundred and fifty feet. This, then, is the place where the channel should be made."

The secretary of war transmitted this information to Congress, and the appropriation was thereupon made, and Colonel Wheeler was directed to proceed with the work accordingly. Colonel Wheeler says : " Whether the opening of the new channel will necessarily close the old one, is a subject of speculation."

John D. Sturtevant states his residence at White Lake since 1861, and from his observations as to the action of the waters on the east shore of Lake Michigan, it is his opinion that the effect of opening the new channel, as proposed, will not be as stated in the bill and by Colonel Webster in his affidavit, but that the present outlet will not be filled or closed.

The affidavit of Charles Mears, a resident on the east coast of Lake Michigan since 1838, states that in that year he built a saw mill on White Lake, and manufactured lumber there for twenty years ; that he has had experience in improving harbors on this shore at six different points ; has been a careful observer of the action and effects of the winds and currents at White Lake and other points. He gives it as his judgment

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that the effect of opening the new channel will not be as stated in the bill of complainants and in Colonel Webster's affidavit. On the contrary, that if the improvement is made, it is his opinion the present outlet will not be filled by drifting sands or by the action of the water.

He further states that strong westerly winds raise the water in White Lake twelve inches or more, and the result will be, if the new channel is made, that as the wind subsides and the water of Lake Michigan recedes, the pent-up waters of White Lake will seek both outlets into the outer lake, not through the new channel alone, and will keep the present channel from filling with drifting sand.

Such are the facts, and such the conflicting opinions presented upon this motion, from which to determine whether the complainants will be irreparably injured by the new channel when constructed.

It is clear that it will not be the new channel which will cause the old outlet to fill with sand, but the wind blowing the sand into this channel that will close it if it should be closed. The current in this outlet cannot be greater than that of the river above, which is two or three miles per hour—it is probably less, but if as great, a current running but two or three miles an hour would produce little or no effect in removing sand precipitated into the bed of the outlet ; hence it is that great expense is necessary annually to remove the deposited sand. The only current that removes sand from the outlet is that which flows at irregular intervals, caused by water from Lake Michigan, blown into White Lake on account of strong westerly winds, running out when the wind subsides ; but this current is not adequate to remove the sand from the channel, and must be aided by the artificial means which are employed.

It appears, then, that this outlet would cease to be navigable to its present extent were it not for the use

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of such artificial means. And, as I view the facts, it does not appear but that, after the new channel is made, the same application of artificial means will keep this outlet open for all practical uses which complainants now enjoy therein. That use is principally in running logs, as vessels now receive complainants' lumber near the mouth of the outlet, and not at their mill, the lumber being conveyed by land carriage to a dock near Lake Michigan.

Complainants have a tug which they employ in this outlet, but it does not appear, from the facts of the case, but that the employment of artificial means in keeping the channel clear, to the extent now employed, would continue the present facilities for tug navigation, as well as other purposes, for which complainants now use the channel ; unless the effect of the new channel will be, not only to take a portion of the water accustomed to flow through the old, but lower the level of White Lake to such an extent as to materially reduce the depth of water in the present outlet.

It is said by the bill that White Lake will, in consequence of the new channel being very much wider, deeper, and shorter than the old one, naturally and necessarily seek the level of Lake Michigan.

This conclusion may be conceded ; but what effect will thereby be produced in the present channel ? The bill gives no information from which to answer satisfactorily the question.

How much above the level of Lake Michigan is White Lake ? Is there any considerable difference, or such difference in the level of the two lakes as that the new channel will so far lower White Lake as to prevent its water flowing into the old outlet, or materially reduce the depth of water therein ? These questions I am unable to answer from the facts of the case, and do not feel disposed to interfere with the public work at White Lake, designed, as it is, greatly to benefit com-

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merce and navigation by affording what does not now exist, a safe and commodious entrance to one of the best harbors on the lake, except the showing is such as decisively to require it.

It will be conceded that the present channel, in its natural condition, is not so far navigable as that vessels of ordinary draught of water navigating Lake Michigan can enter through it into White Lake, and that it is only kept or made navigable for crafts of light draught when artificial means are employed at great cost annually in dredging out the sand which is therein deposited by the frequently recurring strong westerly winds ; and that the new channel will afford ample facilities for all classes of vessels to enter the harbor of White Lake. It is, therefore, of great public importance that the cut be made.

If complainants can reach vessels in White Lake, which enter through the new channel, to transport their lumber to market, without much greater inconvenience than they now do vessels at the mouth of the outlet, they would not seem, in this particular, to be materially injured by the new cut. Their mill cannot be materially different from midway between White Lake and the mouth of the outlet. If sufficient water is left in the outlet, with or without the employment of the artificial means, for floating their logs to their mill, I cannot see wherein they are to be irreparably damaged. The result of the new channel may be to give complainants some inconvenience ; more time may be consumed in running their logs if the current of the present outlet is diminished, as it probably would be ; but mere inconvenience, or delay in navigating a stream, must be submitted to from motives of public policy where the public good demands it.

The right to interfere by injunction rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption

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of that right, which, on just and equitable grounds, ought to be prevented. A court should be extremely cautious in the exercise of this power, and before enjoining an important public work, require a clear case on the facts as well as on the law. The injury should be apparent, and in a case like the present, of apprehended injury, resting largely in opinions on one side, and denials of injury on the other, the question of damage should be put beyond mere probabilities, and reach something like demonstration.

My investigations have led me to the conclusion that complainants' right to the enjoyment of the water of White River outlet, as riparian owners, and as well in right of the public easement, to the extent which they now enjoy its use, is at law clear; but that the facts do not make a clear showing of necessity for the exercise of the restraining power of the court by injunction to protect them in the enjoyment of their rights.

The motion for a temporary injunction is denied.

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BAILEY v. MILNER.

District Court; Northern District of Georgia, February T., 1868.

CONFEDERATE NOTES.—THEIR INVALIDITY.

The securities known as "Confederate treasury notes," issued by the self-styled Confederate States, during the civil war of 1861-'65, although not "bills of credit," issued by a State, and as such prohibited by the Constitution of the United States, Art. I § x. subd. 1, were, nevertheless, illegal; because they were issued by a pretended government, organized in the name of certain States, by subjects of the United States, who were at the time in rebellion against the rightful government of the United States, with design to dismember and destroy it.

A promissory note given in consideration of such bills is void, and does not constitute a debt provable in bankruptcy.

Question upon the certificate of a register in bankruptcy.

ERSKINE, J.—In 1863, John Neal loaned twenty-five hundred dollars in "Confederate treasury notes," to Milner, the bankrupt, for which amount he made his promissory note to Neal. Subsequently Neal, in making a disposition of some of his property among his children and grandchildren, gave this note to his son-in-law, Samuel Bailey, in trust for minor children of Susan Beall, a daughter of Neal.

Bailey, as trustee, sought to prove this claim against the estate of the bankrupt. Counsel for the latter objected: First, because the consideration for the contract was Confederate treasury notes; secondly, because

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these notes were borrowed for the purpose of hiring a substitute to serve in the Confederate army, with the knowledge of Neal ; and that the notes were so appropriated, and the substitute hired therewith did go into the said army.

Evidence being heard on these points, the register rejected the claim, and the proceedings were certified to the judge. The conclusion at which the register arrived was approved.

The party whose claim was thus rejected petitioned the judge for a re-hearing, on the ground that the testimony adduced—in proof of the second objection, in particular—was wholly insufficient to warrant the decision of the register, or affirmance by the court. A new hearing was granted before the register. The testimony on both sides is long and contradictory, with the exception that all agree that the loan was made in Confederate treasury notes.

The register adhered to the course of reasoning previously entertained by him, and gave the same judgment as before. Mr. Bailey being still dissatisfied with the ruling, the matter was again certified for review.

From the views which I entertain of the legal principles involved in this proceeding, it is not essential to an approval or disapproval of the conclusion at which the register arrived, that these Confederate treasury notes, or any portion of them, were used to procure a substitute to serve in the Confederate army, or that they were employed for any other purpose. The register holds, as he held at first, that the contract was illegal and void ; and this result I approve and affirm. But I do not concur with him in one of the principal reasons advanced for his decision ; and which reason is more prominently argued in his first written opinion than in his last, namely, that these notes are bills of credit within the sense of that term, as understood in the constitution.

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“No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit,” etc. *Const.* Art I. § x. 1.

No disquisition on the origin of bills of credit, or history of their rise and progress, or of their fall, under the inhibition just cited, would aid in the determination of this case. Therefore, I will but remark that the great minds that framed the constitution were, from recent experience, aware of the blighting effect on the domestic and foreign commerce of the States, and on the welfare of the whole country, which flowed from the almost indiscriminate issuing of these bills by the colonies, and afterwards by the States, as money, among the people, to suffer its perpetuation, or to longer tolerate it to the States; and time has proven the wisdom of their statesmanship.

So far as I have been able to ascertain, all paper answering to bills of credit put forth during the war of independence were promises to pay. But be this so or not, the supreme court of the United States, in *Craig v. State of Missouri*, 4 *Pet.* 410, held that a paper currency emitted by a State, and receivable in discharge of all debts and taxes due the State, and of all salaries and fees of office, &c. &c.—and pledging the faith and funds of the State for the redemption of these paper issues—was within the constitutional prohibition.

The same court, in *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 *Pet.* 258, gave the following comprehensive definition of a bill of credit: “The definition, then, which does include all classes of bills of credit emitted by the colonies or States, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.”

Taking this definition, as imparted by the highest judicial tribunal in the land, as a guide, it will conduct to a correct conclusion of the endeavor to ascertain

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whether these treasury notes, or bills, issued by the so-called Confederate States, fall within it.

Although it is declared that no State shall emit bills of credit, yet if two or more of the States ally themselves, or confederate together, and on their faith and credit issue these bills, I apprehend the inhibition would apply with a force equally as direct and controlling against the allied or confederate States as against a single one.

Here is a copy of one of these treasury notes :

"Fundable in eight per cent. stock or bonds of the Confederate States. Six months after a ratification of a treaty of peace between the Confederate States and the United States, the Confederate States of America will pay five dollars to bearer. Richmond, September 2, 1861. Receivable in payment of all dues except export duties."

Then follow the names of a register and treasurer.

One decision—and only one—on this subject has been brought to my notice ; that is the case of *Bank of Tennessee v. Union Bank of Louisiana*, lately tried before Judge DURELL and a jury, in the circuit court of the United States for the eastern district of Louisiana, and published in the *American Law Review* for January, 1868.

The judge is there reported to have said, in his charge to the jury, "That Confederate treasury notes issued by said government, and circulated as money, were bills of credit within the meaning of the constitution, and therefore an unlawful issue." The views which present themselves to my mind do not terminate in accord with the opinion expressed by the learned judge.

During the latter part of the year 1860, and in the early part of 1861, South Carolina, Georgia, Louisiana, Virginia, and other States, by similar modes,

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called on the people to send delegates to meet in convention. Accordingly, these conventions assembled, and each passed an ordinance of secession, as it is generally termed, by which ceremony these conventions severally adventured to withdraw the States from the Federal Union, and to release the people from their subjection to the laws of the land, and their allegiance to the nation. The constitutional State governments were overthrown, and superseded by spurious and revolutionary governments. The setting up of a pretended central or general government, styled "The Confederate States of America," followed; and, soon thereafter, open rebellion and war of portentous magnitude burst upon the nation. Prize Cases, 2 *Black*, 635; *Sherridge v. Macon*, United States circuit court, district of North Carolina, Opinion of the court delivered by Chief Justice CHASE, 2 *Am. Law Review*, 95.*

In the seceded States (so-called) the sovereign authority being, for the time, displaced, consequently there ceased to be, within any of them, a government under the constitution of the United States. Then, can it be said that the usurping power could pledge the faith of the State by a public law, or otherwise, for the payment of the notes or bills issued by the so-called Confederate States of America? Or could this pretended central government bind any of those States for the redemption of these notes?

But these Confederate treasury notes or bills do not pretend to have been emitted by a State, or a combination of States of the Union; nor can it be inferred from indicia found upon them—nor can their recondite history show—that they emanated from the sovereign power, and on the faith of any of the States. And thus it will be seen, that they did not possess the characteristic attributes of bills of credit, in accordance with the

* *Ante*, 58.

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definition of the supreme court of the United States ;— they did not issue by virtue of the sovereignty of the State, nor did they rest for their currency on the faith of the State pledged by a public law. *Darringer v. State Bank of Alabama*, 13 *How.* 12.

Notwithstanding these notes or bills were not, in my judgment, bills of credit within the prohibition contained in section x. of article I. of the Constitution, yet they were none the less illegal ; they were issued by a pretended government, organized in the name of certain States, by subjects and citizens of the United States, and who, at the very time, were in rebellion against their rightful government, and whose design and object it was to “dismember and destroy it.” *Prize Cases* ; *Shortridge v. Macon*, *supra*.

It may not be wholly unimportant to remark that it is a well established doctrine of the courts that a wide distinction exists between an executed and an executory contract. In the former case courts of justice will not, as a general rule, interfere between the parties, to set the contract aside, but will leave them where they placed themselves ; and this, too, notwithstanding the contract be in part only founded on an illegal consideration.

Nevertheless, any person owning property may, if no fraud be put upon him, and no misrepresentation, or circumvention, or covin enter into the transaction, alienate it conditionally or absolutely, for what currency or thing he chooses, or even give it away.

But an executory contract, like this claim of Bailey, the trustee, nevertheless, will not be enforced. The principles of law directly applicable to executory contracts, based upon illegality, were long since determined by the courts, both in England and in this country. One case only will be referred to. The doctrine on this subject, as laid down by Mr. Justice WASHINGTON, in *Tolar v. Armstrong*, 4 *Wash. C. Ct.* 296, is

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so succinctly announced that it is best it be given in his own words: "I understand the rule, as now already settled, to be, that where the contract grows immediately out of, and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it."

If this demand of twenty-five hundred dollars were allowed, the dividends of the creditors, arising from the assets would, of course, be diminished that amount—and this without any fault on their part, but wholly through the illegal dealings of the bankrupt and Neal. *Bankr. L.* § 22.

I may add that the law, in allowing a guilty party to take advantage of the illegality of his own act—as is here done by the bankrupt—does so, not with a view of conferring a benefit on him, but upon grounds of public policy; and also, in this case, that injustice may not be done to the creditors of the bankrupt.

The decision of the register is approved. The clerk will certify this opinion to Mr. Register Murray.

NOTE.—This case and *Cuyler v. Ferrill*, *Ante*, 169, should be read in connection with the later decision of the supreme court in *Thorington v. Smith*, 8 *Wall* 1. It is there held, in an action to recover the agreed price in a contract of sale of property made in the usual course of business, and which price was, by the actual intent and understanding of the parties, payable in Confederate notes, that a contract made between persons residing in the so-called Confederate States, during the rebellion, and expressed to be payable in Confederate notes, but having no other tendency or purpose to aid the rebellion than the mere fact of its treating Confederate paper as the currency in which it should be discharged, may be enforced by action in the courts of the United States. Although the government of the Confederate States was not a *de facto* government in the highest sense known to the law, it was for the time being a government of paramount force. It acquired an actual supremacy, which indeed is not a legal defense for

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UNITED STATES v. SIX FERMENTING TUBS.

*District Court, District of Wisconsin; April T., 1868.*PROSECUTIONS FOR FORFEITURES.—LIMITATIONS OF
TIME.

The defendant, in an information to enforce a forfeiture under the internal revenue laws, may take advantage of the fact that the prosecution was not instituted within the time limited by law for commencing it, under the general issue. He is not required to plead specially.

In general, where an action for the recovery of a penalty or a proceeding to enforce a forfeiture is pending at the time of the repeal of the statute imposing such penalty or forfeiture, or is instituted afterwards, the repeal is a bar to the action or proceeding, unless the repealing act contains a saving clause.

The Internal Revenue Act of 1866, in repealing the act of 1864, contains a saving clause (section 70) which operates to preserve and continue demands which vested, and proceedings which were commenced under the act of 1864.

acts of hostility performed under it towards the United States, but which rendered submission to its authority in civil and local matters, not only a necessity but a duty. The notes issued by its authority must be regarded as a currency imposed on the community by an irresistible force. They must be regarded in our courts in the same light as if they had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payment in such currency cannot be regarded, merely for that reason, as made in aid of the insurrection. They are free from blame except proved to have been made with actual intent to promote the insurrection. And they should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation.

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Motion to set aside a verdict against the defendant in an information for a breach of the revenue laws.

The information in this case was filed against certain apparatus used in the distillation of spirits, in violation of the Internal Revenue Law. It charged that the violations of law relied upon as a ground of forfeiture took place between September 3, 1864, and March 1, 1866.

The claimant answered generally "that the said several articles and property seized did not, nor did any part thereof, become forfeited in the manner and form in the said information in that behalf alleged."

Upon the trial of the issue, after evidence upon the question of forfeiture had been produced, the counsel for the claimant offered to prove that the facts relied upon to support the information were substantially brought to the knowledge of the collector and deputy collector of the district in the month of September, 1866, and a seizure of the same property in the distillery was then made, but was not prosecuted. The proof was offered for the purpose of taking advantage of the limitation prescribed in section 68 of the act of June 2, 1864, 13 *Stat. at L.* 248, authorizing seizures. It provides "That such seizures shall be made within thirty days after the cause for the same shall have come to the knowledge of the collector, or deputy collector, and that proceedings to enforce said forfeiture shall have been commenced by such collector within twenty days after the seizure thereof." The evidence was objected to on the part of the prosecution, as not responsive to the information, and not evidence under the answer. The objection was overruled, and evidence admitted.

The evidence showed an investigation of the affairs of the claimant, by the collector of his district, and a seizure of the distillery in September, 1866; a subse-

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quent abandonment of that seizure ; a further investigation by the collector, and a second seizure made in September, 1867, upon which the present information was filed within the twenty days allowed by law.

The jury found a verdict for the United States, which the claimant now moved to set aside, upon the ground that it was against the law and the evidence.

Smith & Carpenter, for the motion.

Lakin & Palmer, opposed.

MILLER, J.—The inquiry is in regard to the knowledge of the collector and deputy collector of the cause for seizure more than thirty days before this seizure was made.

Knowledge of the cause for seizure means knowledge on the part of the officer of facts tending to establish a cause for seizure prescribed in the statute. Mere vague rumor or suspicion, or loose assertions of irresponsible persons, are not sufficient. It must consist of, or be founded upon, such facts communicated to or ascertained by the officer from reliable sources, as *prima facie* to establish a fraud upon the law.

The facts relied on in support of this information, and substantially upon which the verdict was rendered, were known to the collector and deputy collector, and to Inspector Burpee, who is the informer, in the fall of the year 1866, a year before this seizure was made.

The evidence upon the subject of the statute limitation was submitted to the jury, together with all the evidence in the cause, with instructions upon the law of the case. The jury were charged that claimant can take advantage of the statute of limitation ; and that

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the law requires prompt action on the part of revenue officers.

After much reflection I should not feel justified in disturbing the verdict upon the merits. Finding the verdict upon the evidence, mostly circumstantial, was no abuse of the prerogative of the jury. The evidence was sufficient to bring the mind to the conclusion that the alleged cause of forfeiture was well founded. The impeached witnesses were sufficiently sustained and corroborated to authorize the jury in finding the verdict in part on their testimony. The means taken by claimant to procure counter-affidavits from those witnesses no doubt prejudiced his case with the jury.

I will confine this investigation to the subject of limitation allowed to be raised at the trial upon the pleadings. The answer is in the nature of a plea of the general issue. It is a general denial of the facts alleged in the information. In cases of seizure this mode of pleading is allowable. *Conkl. Tr.* 590. Special pleadings in actions for penalties and forfeitures, or in criminal prosecutions, are almost entirely disused. A demurrer to an indictment is occasionally interposed. The general practice is either a motion to quash, or a motion in arrest, after a verdict of guilty. In criminal prosecutions, although a defendant may plead to the jurisdiction of the court, there are but few instances in which he is obliged to have recourse to such a plea. He may take advantage of the matter under the general issue. *Archb. Cr. Pl.* 80.

In a case under the statute of 31 *Elizabeth*, which provides that all actions for any forfeiture upon any penal statute shall be brought within two years, the court held that the defendant may take advantage of the statute on the general issue, and need not plead it. *Bull. N. P.* 195. In *Johnson v. United States*, 3 *McLean*, 89, the court did not permit the party indicted

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to take advantage upon *habeas corpus* of the limitation of indictments, where the objection had not been made of record by plea. In *United States v. Ballard*, 3 *McLean*, 469, the question of limitation was raised upon the date mentioned in the indictment, upon which the alleged perjury had been committed, and the act was held to bar the prosecution. In *United States v. Mayo*, 1 *Gall.* 396, there was a plea of the statute of limitation. But in *Parsons v. Hunter*, 2 *Sumn.* 419-425, the same court declares in the opinion, that in suits on penal statutes, the statute of limitation need not be pleaded; but may be taken advantage of under the general issue.

By section 32 of the Crimes Act of 1790, 1 *Stat. at L.* 119, it is enacted, "That no person shall be prosecuted, tried, or punished for treason or other capital offense, willful murder and forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offense shall be committed; nor shall any person be prosecuted, tried, or punished for any offense not capital, unless the indictment for the same shall be found within two years from time of committing the offense; provided, that nothing herein contained shall extend to any person or persons fleeing from justice." By acts of Congress, the period of limitation for the prosecution of any crime arising under the revenue law, and suits for fines and forfeitures, is five years.

Cases arising under the act limiting prosecutions have been presented to the consideration of courts under different forms of pleading. In *United States v. Slocum*, 1 *Cranch C. Ct.* 485, the limitation was specially pleaded. In *United States v. Porter*, 2 *Id.* 60, the limitation was not pleaded. In *United States v. Wilson*, 3 *Id.* 441, the question was raised by demurrer. In *United States v. White*, 5 *Id.* 73, it is decided that limitation may be given in evidence by the defendant

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under the general issue in a criminal cause, and the United States may give in evidence the fact that defendant fled from justice, and therefore was not entitled to the benefit of the limitation. In the opinion on page 82, the court remarks: "The court is bound to take notice that the defendant, upon the plea of not guilty, had a right to avail himself of the limitation of time, if he was entitled to it; and that the United States had a right to show that he was not entitled to its benefits. If, from accident or ignorance of his rights, the defendant should have been prevented from asserting or using his right, it might be ground of a motion for a new trial." In the case of *Lee v. Clark*, 2 *East*, 333, 336, an action of debt for a penalty given by the game laws, upon the plea of *nil debet*, the verdict was for the plaintiff. Lord ELLENBOROUGH, during the argument, said: "That notwithstanding the allegation that the offense was committed within six calendar months, yet if it were not computed within the time prescribed by the statute, the plaintiff must have been nonsuited." LAWRENCE, J., remarked: "The time having elapsed would have been evidence for the defendant on the plea of *nil debet*." See also 1 *Chitty Cr. L.* 471, 475, 626; *Esp. Pen. Stat.* 78.

The statute limitation seems to require that evidence of the time the officer obtained knowledge of the cause of forfeiture should be received under the general issue. It is an appropriate inquiry upon the trial of the cause. Proof on the subject might involve a more extended range than if the seizure were prohibited after or between certain dates. Seizure is an open and notorious act on the part of the officer, known to the party in possession; but on what day or time the cause of seizure came to the knowledge of the officer may have to be ascertained from proof of several facts.

From this examination of the subject I am satisfied that the evidence was properly admitted, and that the

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verdict, under the instructions of the court upon this subject, should have been for claimant.

A question arises,—What effect the repeal of section 68 has on this case, if any? The information charges the offenses against the act to have been committed between September 3, 1864, and March 1, 1866. And the seizure is alleged to have been made on October 11, 1867, under and in pursuance of the act of June 30, 1864, and the acts amendatory thereof and supplementary thereto.

It is an established rule, that where an action for the recovery of a penalty, or a proceeding to enforce a forfeiture prescribed in a legislative act, is pending at the time of the repeal of the act, or instituted after the repeal, such repeal is a bar to the action or proceeding, in the absence of a saving clause in the repealing act.

A clause of the repealing act provides that the repeal shall take effect on September 1, 1866. The act of March 3, 1865, 13 *Stat. at L.* 472, continues in force section 68 of the act of 1864. These two last acts were in force at the time of claimant's operations in the distillery, and for six months thereafter. The act of July, 1866, repealing section 68, provides, in section 70, "That all the provisions of former acts repealed shall be in force for collecting all taxes, duties and licenses properly assessed, or liable to be assessed, or accruing under the provisions of acts, the right to which has already accrued, or which may hereafter accrue under said acts, and for maintaining and continuing liens, fines, penalties and forfeitures incurred under and by virtue thereof, and for carrying out and completing all proceedings which have been already commenced, or that may be commenced to enforce such fines, penalties, and forfeitures under said acts." It is, therefore, apparent that section 68 of the act of 1864 remains in force as to this case, including the proviso of limitation, notwithstanding the repeal. The distillery apparatus was sub-

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ject to seizure as forfeited for offenses propounded in the information before the repeal affected the section in any manner; and the above provision of the repealing act reserves to the government the right to institute and prosecute these proceedings to enforce the forfeiture.

The court being satisfied that the seizure upon which this information is founded was not made within thirty days after the cause for the same had come to the knowledge of the collector and deputy-collector, it is therefore ordered that the verdict be set aside and the information dismissed.

UNITED STATES v. OLNEY.

District Court; District of Oregon, November T., 1868.

LOTTERIES.—INTERPRETATION OF REVENUE LAWS.

A scheme for the disposal of town lots, by the terms of which a number of lots are sold, and others are reserved to be distributed by lot among the purchasers of the first portion, so that the chance of obtaining one of the reserved or prize lots forms a part of the inducement or consideration for which each purchaser pays the price agreed on for the lot sold to him, is a "lottery" within the operation of a law imposing a tax on lotteries, for purposes of revenue.

Various definitions of the term lottery,—collected.

A revenue law ought to be liberally construed, with a view to attain the object for which it is enacted,—viz: the raising a revenue.

Trial by the court.

This action was brought against Cyrus Olney, to recover a special tax of one hundred dollars, claimed to

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be due from him as a "lottery dealer;" under section 79, subd. 6 of the Internal Revenue Law of June 30, 1864, as amended by the act of July 13, 1866.

Upon the trial, which took place before the court without a jury, in pursuance of a stipulation between the parties, the court found the following facts, among others:

On March 15, 1867, the defendant, being the owner of a large number of town lots in Astoria, in Oregon, entered upon a scheme for disposing of them. Three hundred lots he offered for sale at the uniform price of fifty dollars. The other three hundred he arranged in what were denominated "prize parcels." Some of these comprised two, four, or six lots each; others, single lots, of various values; while one comprised a house and lot, and another a cottage and three lots, of considerably greater value than the parcels in the first mentioned classes. By the terms of his advertisements and sales, each purchaser of a fifty-dollar lot received a ticket entitling him to a share or chance in a distribution by lot of the prize parcels.

After the defendant had sold all the fifty-dollar lots, each having a ticket or share in the distribution connected with it, and in pursuance of the scheme above described, a drawing of lots was made, upon the results of which certain persons from among the purchasers of the fifty dollar lots were declared to be the purchasers of the prize parcels drawn by them, respectively, and the defendant executed deeds to them accordingly.

About one-third of the contracts for the purchase and sale of the tickets or shares in the scheme were in writing, in two parts. One of these parts was signed by the defendant, and was in these words:

"ASTORIA, *May* 1, 1867.

"This certifies that Paul Corno has subscribed for twenty shares in my scheme for the sale and distribu-

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tion of town lots in Astoria, Oregon, and will be entitled to a warranty deed for the property which shall be drawn to him according to the prospectus, on payment of the note given for the purchase money.

“(Signed)

CYRUS OLNEY.”

The other part was signed by the subscriber, and was in these words :

“\$1,000.

ASTORIA, *May 1, 1867.*

“For value received, I promise to pay to the order of Cyrus Olney one thousand dollars in gold coin. This note is given for twenty shares in the Astoria town lot distribution, and is payable when the deed is ready for delivery, according to the prospectus.

“(Signed)

PAUL CORNO.”

The question in the case was, whether the scheme above described constituted a “lottery” within the meaning of that provision of the internal revenue law which imposes a special tax upon every lottery ticket dealer.

Addison C. Gibbs, for the government.

The defendant in person.

DEADY, J.—This action is brought to recover the sum of one hundred dollars, alleged to be due the United States from the defendant, as a special tax for engaging in the business of lottery dealer. It was commenced October 17, 1867, and tried by the court without the intervention of a jury, on November 13 thereafter, and has since been continued from term to term for deliberation and advisement. The facts of the case are stated in the findings of the court.

The law imposing this tax is found in subdivision 6 of section 79 of the Internal Revenue Act of June 30,

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1864, as amended by the act of July 13, 1866, 14 *Stat. at L.* 116, which reads as follows :

“Lottery ticket dealers shall pay one hundred dollars. Every person, association, firm, or corporation which shall make, sell, or offer to sell lottery tickets or fractional parts thereof, or any token, certificate, or device representing or intending to represent a lottery ticket or any fractional part thereof, or any policy of numbers in any lottery, or shall manage any lottery, or prepare schemes of lotteries, or superintend the drawing of any lottery, *shall be deemed a lottery ticket dealer.*”

The statute imposes a tax upon a dealer in lottery tickets, and also declares who shall be deemed such dealer, but it does not define or limit the signification of the word *lottery*. A person to be liable as a dealer in lottery tickets must, in some of the modes or instances mentioned in the statute, be engaged in the preparation, conduct, or management of a *lottery*, so that the liability of the defendant turns upon the question, What is a lottery? The answer to this question must be found in the meaning of the word, as established by usage and authority. I assume, with the argument for the defendant, that the legal and popular meaning of the term coincides, and that it is used in the statute according to its primary and general acceptation. Indeed, I am not aware that the word has any technical or peculiar significance.

The word “lottery” is defined and used as follows by lexicographers and writers :

“A distribution of prizes and blanks by chance ; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value either in money or other articles.”—*Worcester's Dic.*

“A disposition of prizes by lot or chance.”—*Webster's Dic.*

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“A scheme for the distribution of prizes by chance.”
—*Bouvier's Dic.*

“A kind of game of hazard, wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate.”—*Rees. Cyclopædia.*

“A sort of gaming contract, by which, for a valuable consideration, one may by favor of the lot obtain a prize of a value superior to the amount or value of that which he risks.”—*American Cyclopædia.*

“That the chance of gain is naturally over-valued, we may learn from the universal success of lotteries.”—*Smith's Wealth of Nations*, b. 1, c. 10.

All these authorities agree that where there is a distribution of prizes—something valuable—by chance or lot, that this constitutes a lottery. But the definitions from *Worcester* and the *American Cyclopædia* are the most complete. From each of these it expressly appears that a valuable consideration must be given for *the chance* to draw the prize.

Tried by this standard, it is manifest that the scheme prepared and carried out by the defendant for the sale and distribution of these town lots was a lottery. True, the purchasers of tickets or shares were in any event to get something—at the least, a lot, for the purposes of this scheme *estimated* to be worth fifty dollars. But it is not probable that any one would have purchased a ticket if it was certain that he would have received nothing in return but one of these so-called fifty dollar lots. If the first three hundred lots could have been sold for fifty dollars each on account of their market value, certainly the defendant would not have been improvident enough to put the other three hundred prize parcels into market at the same price, while their actual value was from one hundred dollars to five thousand dollars each. This is neither reasonable nor probable.

The *chance* of obtaining five thousand dollars for fifty dollars was the enticing object which the scheme

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held up to the public as an inducement to purchase the shares, and this "chance of gain," upon which depends "the universal success of lotteries," was to be determined by lot. This scheme has all the attributes and elements of a lottery. It is a distribution by lot of a certain number of prizes among twice the number of persons; and that, too, of prizes very unequal in value. The certificate of purchase issued by the defendant to each purchaser is a ticket which entitled the holder to the chance of drawing a prize of from two to one hundred times the value of the price of the ticket. It is evident that the first three hundred lots could not have been sold by any ordinary method at fifty dollars each, *if at all*. This is also probably true of many of the prize parcels. Whatever may have been their intrinsic or future value, the evident aim of the scheme was to sell them for more than their market value, and this was to be accomplished by an appeal to the universal passion for playing at games of chance. The purchase of the ticket and the payment of fifty dollars was made for the *chance* of obtaining one of the prize parcels, represented to be worth many times that sum.

This was a lottery according to the common acceptance of the word. It was a lottery within the definitions in the dictionaries.

It matters not, even if the purchaser was to receive the *full value* of his money in any event. As a matter of fact, the money was paid for the chance of the prize also, and, would not have been paid without this inducement. The sale of the ticket by the defendant gave the purchaser this chance to obtain something more than he paid for. This was dealing in lottery tickets within the purview of the revenue act.

The argument of the defendant assumes that the purchasers of the property bought six hundred parcels in common, and after thus becoming the owners of the

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same, adopted this method of distributing or dividing it among themselves.

If persons *already* owning family plate, pictures, or other property, not susceptible of division, or even equal division, choose to distribute by an appeal to lot what has thus come to them *before* they had any scheme of so distributing it, they are not within the definition of a lottery, nor liable to this special tax. They have not given a valuable consideration for *the chance* of obtaining something of much greater value—a prize.

The argument of the defendant is ingenious and plausible, but it is based upon an incorrect assumption. It ignores the fact—the mainspring of the whole transaction—that the tickets were sold and purchased for the avowed purpose of giving to each of the purchasers a *chance* to obtain a prize parcel by means of this subsequent allotment. The division by lot was not an afterthought of the purchasers, but a prominent part of the original scheme of sale and distribution as prepared by defendant. No purchaser bought any particular lot or parcel, or any undivided interest in the whole property. Each purchaser bought the right to have, by allotment, one of the three hundred lots, estimated to be worth fifty dollars each, and the chance of obtaining instead of such lot one of the three hundred prize parcels, represented to be worth from one hundred dollars to five thousand dollars. The chance of obtaining one of these prizes, and even the most valuable one, rather than the fifty-dollar lot, induced the purchaser to buy, and enabled the defendant to sell the certificate of purchase. Indeed, the sale of the first three hundred lots, in three hundred parcels, for fifty dollars each, upon the condition that they should be distributed among the purchasers by lot, would itself be a lottery, unless the lots were *in fact* of equal value, which is very improbable.

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The case is in almost every respect the counterpart of the celebrated case of the American Art Union, decided in New York in 1852. The scheme of the Art Union was that by paying five dollars, any person could become a subscriber, and entitled to an engraving and certain numbers of *The Bulletin* containing the proceedings of the society, and the *chance* of obtaining one of a number of valuable paintings which in December of each year were to be distributed by lot among the members. The drawing was to be conducted precisely as in this case, by placing the name of the subscriber in one box and the name of the painting in another. A number being drawn from the latter box, a name was drawn from the former one, and the person whose name was thus drawn was to be the owner of the prize represented by that number.

The supreme court decided that this was a lottery. 13 *Barb.* 577. The case was then taken to the court of appeals, and argued on behalf of the Art Union with great ability. The court of appeals affirmed the decision of the supreme court that the scheme was a lottery. 7 *N. Y.* (3 *Seld.*) 228. The proceeding in the New York courts was to enforce the forfeiture of the property proposed to be distributed by this scheme, and the case turned upon the construction or interpretation of the word "lottery" in the prohibition contained in the constitution of the State: "No lottery shall hereafter be authorized in this State."

This action is simply to enforce the collection of a tax imposed by the United States upon all lotteries. A revenue law is not to be strictly construed, but rather the contrary, so as to attain the ends for which it was enacted. With the policy or impolicy of allowing lotteries the revenue act does not interfere. It simply provides for taxing them, whenever and wherever they in fact take place. They are specially and heavily taxed, not for the purpose of encouraging or pro-

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hibiting them, but upon the same ground that many other special taxes are laid ; because, as a rule, it is well known that their owners and managers receive from the public large gains, without giving any equivalent therefor.

Keeping this end in view, it is apparent that the revenue act ought to be so construed as to include every case of the distribution of property or money which contains the essential elements of a lottery—the payment of a valuable consideration for *a chance of obtaining by lot* something more valuable in return.

It is true, the defendant may have engaged in this scheme without any thoughts of becoming a dealer in what the law deems lottery tickets. Indeed, other motives than actual gain may have induced him to make the sale and distribution that he did. In the prospectus of the scheme, published by him, he asks the question :

“Why is this property put into a raffle at prices which average less than half the selling rates ?” and answers it as follows :

“Only because the sale to citizens, for actual improvement, at full prices, at the rate of three to five thousand dollars a year, on time, as heretofore, is no longer adapted to the circumstances of the proprietor, who has become an invalid, and must hasten to complete the improvements and enterprise which he has in hand.”

But even upon this mild view of the scheme, for the purpose of taxation it must be considered, or rather *is*, a lottery. By it many persons are induced to buy property which has no *present market value*, and which they otherwise would not purchase at any price, because there is set before them *the chance of obtaining by lot* a certain prize or piece of property of much greater value than the consideration advanced.

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Let judgment be given for the plaintiff for the sum demanded in the complaint, and the costs and expenses of the action.

Judgment accordingly.

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*Circuit Court ; Seventh Circuit, District of Wisconsin,
February T., 1869.*

REMOVAL OF CAUSES.—TIME OF MAKING APPLICATION.

A State court has no power to entertain an appeal or other proceeding to review an order made in such court granting a petition to remove a cause from the State court to a court of the United States ; nor can the State court withhold or delay the transfer of the record from its clerk's office to the United States court pending any such review.

An application in a State court for the removal of a cause to a United States court, made after trial and judgment in a State court of original jurisdiction, and judgment of a State court of appellate jurisdiction, which in effect reverses the judgment below *and orders a new trial* or hearing, is in season, where the application is made under the Act of March 2, 1867, 14 Stat. at L. 558,—which authorizes the petition to be filed at any time “before the final hearing or trial” of the suit. The reversal and order for a new trial or hearing open the case to litigation the same as if no judgment had ever been rendered.

Motion for leave to file copies of the papers in a cause removed from a State court instead of the originals ; and for leave to proceed in the cause.

Finches, Lynde and Miller, for the motion.

Vilas and Spooner, opposed.

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MILLER, J.—This motion is made under the act of March 2, 1833, § 4, 4 *Stat. at L.* 634, which enacts that "In any case in which any party is, or may be by law entitled to copies of the records and proceedings in any suit or prosecution in any State court to be used in any court of the United States, if the clerk of said court shall upon demand, and the payment or tender of the legal fees, refuse or neglect to deliver to such party certified copies of such record and proceedings, the court of the United States in which such record and proceedings may be needed, on proof by affidavit, that the clerk of such court has refused or neglected to deliver copies thereof on demand as aforesaid, may direct and allow such record to be supplied by affidavit or otherwise, as the circumstances of the case may require or allow, and thereupon such proceeding, trial and judgment may be had in the said court of the United States, and all such process awarded, as if certified copies of such records and proceedings had been regularly before the said court." The conditions of removal of causes from a court of the State to a court of the United States, according to the act approved March 2, 1867, 14 *Stat. at L.* 558, are that where a suit is pending in the State court at the time of the application for removal, in which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he shall make and file in such court an affidavit stating that he has reason to, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next circuit court of the United States, to be held in the district where the suit is pend-

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ing, and offer good and sufficient surety for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony and other proceedings, &c. And it shall be thereupon the duty of the State court to accept the surety, and proceed no further in the suit.

The circuit court of Dane county was satisfied that all the requirements of the act were complied with by plaintiff, and on inspection of the record found that there had not not been a final trial or hearing of the suit. The court then accepted the surety offered, and ordered that all proceedings in the suit be stayed. In section 12 of the Act of 1789, 1 *Stat. at L.* 73, is the same provision in respect to the surety upon an application for the removal of causes from State to United States courts, "that it shall be the duty of the State court to accept the surety and proceed no further in the cause." The supreme court of the United States in *Gordon v. Longest*, 16 *Pet.* 97, decided that when the application for the removal of a cause is in proper form, and the facts on which the application is founded are made to appear according to the requirement of the act, the party is entitled to a right to have the cause removed under the law of the United States, and the judge of the State court has no discretion to withhold the right. And when, on application for the removal, it is shown that the case is one embraced by the act, and that the party has complied with the required conditions, it is the duty of the State court to proceed no further in the cause, "and every step further taken in the case, whether in the same court or in an appellate court, is *coram non judice*, and, of course, nugatory. See, also, *Kanouse v. Martin*, 15 *How.* 198. Submitting to the authority of the act of Congress, and of the decisions of the supreme court of the United States, I have no other discretion than to decide that the clerk of the circuit court of Dane county was not justified in

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withholding the transcript from the plaintiff, either under the prohibition of the court, or by reason of the appeal after acceptance of the surety, and the order of removal of the cause to this court.

I will dispose of the remaining positions of the defendant's counsel as if upon a motion to remand the cause to the Dane circuit court.

It is objected that all the defendants are not citizens of the State of Wisconsin. Levi B. Vilas and Esther G. Vilas, his wife, are the principal party defendants. They are the parties to the mortgage in suit. It is alleged that Martin T. Vilas, one of the defendants, is a citizen of the State of Vermont, and is the owner of the equity of redemption of the mortgaged premises. Thomas Reynolds and Leonard J. Farwell, the remaining defendants, are citizens of this State. It is set out in the petition for removal that the persons named as defendants, except Levi B. Vilas and wife, have been either personally served with process issued in the cause, or have voluntarily entered their appearance, and that all the defendants except Levi B. Vilas have, by the rules and practice of the court, confessed and admitted the plaintiff's cause of action, by not answering the complaint of plaintiff, as required by law and rules and practice of the court. The State court finds that in this action now pending there is a controversy between Jay Camiah Akerly, plaintiff, and Levi B. Vilas, one of the defendants. From this it would seem that the allegation of the petition that the complainant had been taken as confessed against all the defendants except Levi B. Vilas, is correct. The service and appearance of those defendants may possibly require them to appear and answer a new bill to be brought in this court, or, in default of an answer, to let the bill be taken as confessed against them. But whether such be the practice or not, I need not now determine. At the final hearing a question may be raised whether a de-

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cree can be made irrespective of these defendants. At present they do not appear to be necessary parties. See *Wood v. Davis*, 18 *How.* 457.

Another objection to the removal of the cause to this court is, that the application was not made "before the final hearing or trial in the State court."

It appears from a report of the case in 21 *Wis.* 88, that the suit is for foreclosure of a mortgage given by Levi B. Vilas and wife, to secure the payment of certain bonds. That the cause came on to be heard between the plaintiff and Vilas, the defendant, and a decree was rendered against the plaintiff, the court holding that the bonds and mortgage were invalid, from which decree the plaintiff appealed to the supreme court. And the defendant also appealed for alleged error of the court in striking out his counter-claims, and rejecting evidence in support of them. The supreme court decided that the bonds and mortgage were valid, and that one of the counter-claims was improperly stricken out, and reversed the judgment of the circuit court on both appeals. The cause came on a second time to be tried before the circuit court, when a decree was rendered in favor of plaintiff, from which defendant Vilas appealed upon the ground of the rejection by the court of a certain counter-claim set up in his answer. The supreme court reversed that judgment or decree, and remanded the cause to the Dane circuit court for further proceedings according to law. If the cause had been finally determined by either judgment of the circuit court, or by order of the supreme court, then the application for removal would not have been filed before "the final hearing or trial." But the last order of the supreme court, reversing the judgment of the circuit court, and remanding the cause to that court for further proceedings according to law, opened the whole case to litigation, the same as if no judgment had ever been rendered. The supreme court in effect ordered a

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venire facias de novo, which required the circuit court to hear the cause as if no hearing or trial had taken place. The whole proceedings were *in fieri* when the petition for removal was presented to the circuit court. I am, therefore, of the opinion that the petition was presented before the final hearing or trial of the cause.

The motion of plaintiff is granted.

NOTE.—Subsequent to this decision, the appeal was moved, on behalf of the plaintiff, in the supreme court of the State, and a decision rendered reaching the general results that the order of removal was reviewable on appeal in the State court, and that it was improperly made and should be reversed.

We give so much of the opinion in the State court as relates to these two points:

PAINE, J.—The application for removal was made by the plaintiff under the act of Congress of March 2, 1867, and the appellant claims that the order was erroneous upon two grounds: 1st. That the case was not within the act; 2nd. That if it were within it, the act itself, so far as it professes to authorize a non-resident plaintiff who had commenced his suit in the State court to obtain removal, is invalid.

The respondent's counsel have declined to argue either of these questions, but have contented themselves with simply submitting and briefly discussing the proposition that this court has no jurisdiction to hear and determine this appeal. Of course, this question must be determined upon the hypothesis that it is possible that the case may not have been within the act of Congress, and that even if within it, the act may have been invalid. Counsel assume this possibility, for they say that the appellant's remedy " (if indeed he has any) is to apply to the Federal court to remand the case to the State court."

In support of the position they refer to two classes of authorities. But these wholly fail to sustain it, and in truth warrant directly the opposite conclusion. And it would seem impossible to have drawn any such inference from them, except by confounding the distinction between the two classes, and applying the doctrines of both indiscriminately to each. Thus they first refer to several cases, holding that where a proper application for a removal is made, in a case where the party is entitled to a removal by law, the jurisdiction of the State court ceases, and every subsequent step, except that of sending the case

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away, is *coram non judice* and void. They next cite another class, holding that where the order of removal was improperly made, in a case where the party was not entitled to it, an application may be made to the Federal court to dismiss it for want of jurisdiction, and they then seek to transfer to the latter class of cases the doctrines of the former, and to hold that the jurisdiction of the State court ceases, and every step subsequent to the application for removal is equally as unauthorized and void in those cases where the order of removal is improper and the party not entitled to it by law, as in the others.

Such a conclusion is in conflict with both classes of cases. Both proceed upon the express assumption that it is only when the removal is authorized by law, and the application properly made, that the jurisdiction of the State court is divested and that of the Federal court attaches. Both proceed upon the assumption that where this is not the case, the jurisdiction of the State court remains, and the Federal court acquires none whatever. And yet we are now asked to hold, that although this case may have been one of the latter class—though it may be one in which there was no law authorizing a removal, and in which, consequently, the Federal court acquired no jurisdiction, yet that by some unaccountable process the State court lost it, so that between the two the jurisdiction has lapsed entirely. Such a conclusion would be extraordinary indeed, and it has as little support in authority as it has in reason.

If there was no law authorizing the removal, and there was none if either of the positions taken by the appellant is true, then the jurisdiction of the State court remained unimpaired, and there was no obstacle in the way of its exercise, except the erroneous order that the case be removed. And the idea that the appellate power of the State court cannot be invoked to correct this error—that it remains in abeyance, suspended by such an unauthorized application, that the court which has jurisdiction must decline to exercise it, until the court that has none shall see fit to disclaim it—is one that cannot be supported upon any reasoning.

But if the right to appeal exists in a case where the removal is unauthorized, then it must also exist even when the order of removal is proper. The question whether the court has power to hear and determine the appeal, cannot depend upon the conclusion to which it may come on the merits of the order to be reviewed.

Nothing is better settled in legal practice, than that an order by which a subordinate court dismisses a case for want of jurisdiction, or in any way divests itself of jurisdiction, is subject to review on appeal. It is within the express provision of our statute that allows an appeal from any order which prevents a judgment from which an appeal might

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be taken. It is the common practice of all courts. The case of *Mayer v. Cooper*, 6 *Wall.* 247, cited by the respondent, is one where the supreme court of the United States reviewed such an order, made by the United States circuit court. It is true in that case the order or judgment of dismissal was reversed, the court holding that the circuit court had jurisdiction. But if they had held differently, they would have affirmed the order, and not have dismissed the writ of error. This is the invariable practice. And this shows that the exercise of the power to hear and determine an appeal from an order by which a subordinate court attempts to divest itself of jurisdiction, is not an assertion of jurisdiction in the case subsequent to and in defiance of the application for removal. It is merely the decision upon that application itself. And that decision, whether the power be exercised by a subordinate or appellate court, is not the exercise of jurisdiction in the case. It is the determination of an independent preliminary question, and one which every court, from the necessity of the case, has the power to determine whenever presented.

And whoever invokes the exercise of this power on the part of a subordinate tribunal of the State, must invoke it subject to all the conditions imposed upon that tribunal by the law of its existence; and one of those conditions is that an order made upon such an application is appealable.

That the power to hear and determine an appeal from such an order is entirely independent of the question of jurisdiction to proceed upon the merits of the action, the case of *Nelson v. Leland*, 22 *How.* 48, is an express authority. A motion was there made to dismiss the appeal on the ground of a want of jurisdiction originally in the subordinate court, and the chief justice delivered the opinion of the court, "that the question of jurisdiction in the lower court is a proper one for appeal to this court, and for argument when the case is regularly reached, and that this court have jurisdiction on such appeal." The motion was therefore denied, and upon the express ground that their jurisdiction of the appeal was wholly independent of the actual jurisdiction of the lower court, to try the action upon its merits. And if this is so, the exercise of this appellate power is not the exercise of that jurisdiction of which it is claimed the State court is divested by the presentation of a proper application for removal. It is true that if the appellate court should sustain the jurisdiction of the State tribunals, they might proceed subsequently to attempt to exercise it. But the mere determination of the question whether such jurisdiction had ceased or continued is not an exercise of it, any more when made by the appellate than it was when made by the subordinate court.

Indeed, the right and the duty of the State courts to exercise such

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appellate power has been expressly decided by the supreme court of the United States in *Kanouse v. Martin*, 15 *How.* 198. The court of common pleas in the city of New York had denied an application for removal, and afterwards proceeded to try the action on the merits, and rendered judgment. It was taken by appeal to the superior court, which affirmed the judgment. And the supreme court of the United States reversed that judgment, not on the ground that the superior court erred in taking jurisdiction of the appeal, but in neglecting to reverse the judgment of the common pleas for refusing the application for a removal. They say: "The error of the superior court was, therefore, an error occurring in the exercise of its jurisdiction, by not giving due effect to the act of Congress under which the plaintiff in error claimed," &c. And it made an order remanding the case to the superior court, with directions for further proceedings in conformity to the opinion. And such further proceedings would consist wholly of an exercise of the appellate power of the superior court to reverse the judgment of the common pleas.

And yet we are referred to this case by the respondent's counsel to support their assertion, that this court will "stultify itself by taking jurisdiction of this appeal."

This court certainly is not oblivious of the fact, that if it should hold that a removal of this suit was unauthorized, and should subsequently proceed to render final judgment after such further trial as may be necessary, the supreme court of the United States may assert its appellate jurisdiction over that judgment, may reverse it, and remand the case with directions similar to those in *Kanouse v. Martin*, as counsel suggest. But we feel very confident that if it should do so, it will not be because this court erred in assuming jurisdiction of the appeal, but because it will think this court erred in holding the plaintiff not entitled to a removal.

I have thus endeavored to state the distinction between the exercise of the power to decide upon the application for a removal, whether by the subordinate or appellate court, and the exercise of jurisdiction over the merits of the action, for the purpose of showing that the broad language used by the court in *Gordon v. Longest*, 16 *Pet.* 104, cannot in any event be applicable to the exercise of such appellate power. But it is perhaps doubtful whether the same language would be now used by that court. The subsequent case of *Kanouse v. Martin* seems studiously to avoid it, and makes no suggestions that the judgment of the court of common pleas, and of the superior court were void for want of jurisdiction, but speaks of them throughout the opinion as merely "erroneous." And the same view is also supported by the case of *Hadley v. Dunlap*, 10 *Ohio St.* 1.

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I come, therefore, to the conclusion that this order is appealable, and that it is a duty of this court from which it cannot shrink, to proceed to a determination of the questions presented.

Was the case within the provisions of the act of Congress? The act provides that the non-resident party to a suit in a State court, between a citizen of that State and a citizen of another State, shall be entitled to a removal, on making the proper application, "at any time before the final hearing or trial of the suit." The question arises upon this language, Was the application here made "before the final hearing or trial," in accordance with its intent and meaning?

What was its intent? I think it will not be claimed that the word "final," as used in this provision, applies to or qualifies the word "trial." The word "hearing" has an established meaning as applicable to equity cases. It means the same thing in those cases that the word "trial" does in cases at law; and the words "final hearing" have long been used to designate the trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, and which are termed interlocutory. This use and meaning of the words, are too well established and too familiar to require reference. I assume, therefore, that the meaning of the statute is the same as though these words were transposed, and it provided that the application might be made at any time "before trial or final hearing," and that no implication can be raised by attempting to apply the word "final" to the word "trial;" that Congress intended to distinguish between those trials which might only partially dispose of the case, and such as might occur afterwards, and to allow this right of removal so long as any question yet remained to be tried, in order to the complete disposition of the suit. It will be observed that in the act of 1866, of which this is amendatory, the words were so transposed, and the application was required to be made "before trial or final hearing;" and their transposition in the present statute was evidently merely casual, not designed to effect, and not effecting any change whatever in their meaning. The obvious intention of the statute was to require the party desiring to apply for a removal to do so before trial in actions at law, and, what is the same thing, before final hearing in actions in equity. The reason and justice of this, if a removal is to be allowed at all, are apparent. Only the non-resident can apply for it. And it would constitute the very essence of injustice to give him the right to experiment upon the decisions of the State tribunals, obtaining those which if in his favor would be binding and conclusive upon the other party, but which if against himself, he could repudiate and take his chances again in a new tribunal. The statute did not intend to provide for any such wrong, but on the contrary clearly designed to exclude

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the possibility of it, by requiring the application to be made before trial or final hearing. It seems clear, therefore, that whenever in any State court there has been a trial in an action at law, or a final hearing in an action in equity, the result of which was an adjudication, which upon the principles governing judicial decisions would be final between the parties, as to any portion of the merits of the action, the case has passed beyond the stage when it was within either the letter or the spirit of the law.

How was it with this suit in that respect? It was an equitable action, brought in 1860, to foreclose a mortgage in the circuit court of Dane county. The defendant, in accordance with the practice prevailing in this State, interposed by way of defense certain counter-claims, growing out of and connected with the transactions in which the mortgage originated.

To these there was a demurrer by the plaintiff, which was overruled, and the order overruling it was affirmed on appeal to this court. Various proceedings were subsequently had, and the case was then brought to final hearing, and a decree rendered in favor of the defendant, dismissing the complaint. That was reversed on appeal to this court, and another final hearing was had, in which the plaintiff obtained a judgment. That was reversed by this court, and the cause remanded for further proceedings; and at that stage of it this application for a removal was made. It will be seen, therefore, that instead of being made before final hearing, it was not made until after there had been two final hearings. And it is no solecism to speak of two final hearings in an equity case, any more than it is to speak of two trials in an action at law.

It is material, then, to consider what was the effect of the several decisions of this court in respect to the rights of the parties as to the matters involved in them. No doctrine is better settled here than that the matters decided become *res adjudicata*; those decisions became the law of the case, binding upon the parties, binding on the subordinate court, and disposing finally of the questions decided. Whatever further proceedings might be necessary to the ultimate disposition of the case, those questions were no longer open. *Luning v. State*, 1 *Chand.* 264; *Parker v. Pomeroy*, 2 *Wis.* 112; *Downer v. Cross*, *Id.* 371; *Cole v. Clark*, 3 *Id.* 323; *Jones v. Reed*, 15 *Id.* 40.

If this rule were peculiar to this State, still the decisions of this court would govern, as to the effect of our own judicial proceedings between the parties. But the same rule prevails everywhere; and it has been asserted by the supreme court of the United States quite as strongly as by any other tribunal. In *Martin v. Hunter*, 1 *Wheat.* 304, counsel raised a question as to the propriety of a former decision, the

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case having already been before the court on a former writ of error. On page 355, the court say : "In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formally adjudged in this court, the same point was argued by counsel and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties, and could not be re-examined." So it was held that the same rule prevailed in equity, and that a second appeal to that court brought up only the propriety of the proceedings in the court below, subsequent to the mandate on the first. *Hopkins v. Lee*, 6 *Wheat.* 109. In *Exp. Sibbald*, 12 *Pet.* 492, that court said, "a final decree in chancery is as conclusive as a judgment at law. Both are conclusive of the rights of the parties thereby adjudicated." See also *Bridge Co. v. Stewart*, 3 *How.* 413; *Roberts v. Cooper*, 20 *Id.* 467.

It appears, therefore, that by the principles universally recognized as applicable to the effect of judicial proceedings, there had been several trials of this case, both in the subordinate and appellate courts of this State, and several judgments by the latter, which, so far as our judicial system is concerned, were final and conclusive between the parties, as to the questions decided.

It is true, those judgments did not finally dispose of the case. But that fact does not at all impeach their finality as to the matters disposed of by them. There are few important cases but what are carried more than once into the appellate courts. But the fact that the judgments of those courts do not in the first instance completely dispose of the case, has never been supposed to annul their effect entirely, and to place the case, when it got back into the subordinate court, precisely as it would be if there had never been any trial or appeal whatever. On the contrary, as the authorities above referred to fully show, when the case gets back into the inferior court it carries with it the judgment of the superior as the established law of the case, and no questions are open to further examination except those which that judgment has left open.

A trial or final hearing consists of the examination and determination both of questions of law and fact. In equity cases the court may determine both. On appeal this court may determine both. But the case may have been so presented that we could only properly determine the questions of law, leaving a further trial upon a part or all of the facts necessary for a complete adjustment

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of the controversy. This was true in this suit. The struggle in the case was upon the questions of law growing out of the defendant's counter-claims. Those questions were fully considered, and finally decided on the last appeal to this court; and the case was remanded for such further trial upon the questions of fact, as was necessary to its final determination. And yet after all these years of litigation, these repeated hearings and judgments, both of the subordinate and appellate courts of this State, it is now claimed that this application for a removal was made "before trial or final hearing." If such had been the intention of Congress, I cannot think it would have stopped where it did. If it would set aside and destroy the effect of repeated trials and judgments, why hesitate before the last one? If it would intervene after all the most important questions in the case had been tried and passed into judgments, binding and conclusive on the parties, why pause before the fact that some question, perhaps a minor and unimportant one, still remained to be tried, in order to a complete disposition of the case? When tried, the judgment concerning it could be no more final, no more binding, than the previous judgments had been as to matters involved in them. Hence, if they were to be overthrown, why not overthrow the whole, and allow the party to remove his case, and try it anew in a court of original jurisdiction, after it was finally and wholly disposed of by the judgment of the State court? There could be no greater objection to the justice of such a law than there is to it as it now stands, if it is to have the effect contended for. If the effect of two trials and judgments in all the State courts was to be annulled, there could be no reason why the same thing should not be done as to three or any other number necessary to dispose of the case.

But the act furnishes no evidence of such intention. On the contrary, both its letter and spirit exclude it. The law had formerly allowed only non-resident defendants to apply for a removal. And they were required to be prompt, and to make their election at the outset, and before taking any steps which could be construed into a voluntary submission to the jurisdiction of the State court. This act designed to extend the right to non-resident plaintiffs as well. It designed to extend the time, so that the application might be made at any time before trial or final hearing. But it did not design to go so far as to allow the party actually to submit his case to the judgment of the State court on the merits, and then, if its judgment should be against him, but should not happen to finally determine the case, to exercise his right of removal. To induce a court of justice to infer a design to effect such an object, to borrow the language of Chief Justice MARSHALL, "the intention should be expressed with irresistible clearness." But here, so far from that being the case, Congress has explicitly

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required that the application shall be made "before final hearing or trial." And the spirit and object of the act unite with its letter, in conducting imperatively to the conclusion that its meaning was to require it to be made before the party had voluntarily submitted his case to any trial or final hearing whatever in the State court.

Nor is this conclusion at all impeached by the rule that has been established by the Federal and other courts, under statutes authorizing appeals or writs of error from final judgments or decrees. It is generally held there, that the decree or judgment must be one purporting a full and final disposition of the case, and not on its face reserving a part of it for future decision by the court; yet, even in those cases, the rule has not been held with unreasonable strictness, but those decrees which substantially dispose of the merits of the controversy are held final so as to allow an appeal, although some matters essential to a complete execution of the decree are reserved for further examination and decree. Thus, in *Forgay v. Conrad*, 6 *How.* 201, a decree was passed disposing of the general merits of the action, but directing an account of rents and profits, and reserving that subject for further decree. A motion was made to dismiss, on the ground that the decree was not final. The court said: "The question upon the motion to dismiss is, whether this is a final decree within the meaning of the acts of Congress. Undoubtedly it is not final within the strict technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." See also *Bronson v. Railroad*, 20 *How.* 524, 581. But even if, under this class of statutes, it were held that the decree or judgment must be absolutely final to authorize an appeal, no argument could be drawn from it by analogy against the conclusion already arrived at. The difference in the objects of the two statutes would at once furnish an answer. The one is designed to regulate the exercise of an appellate jurisdiction, by which the judgments of an inferior tribunal may be reviewed. It is natural in such case to require the inferior court first to dispose, substantially at least, of the whole case, before the appellate power could be invoked. But the object of the other statute was not to provide for a review of the decisions of an inferior tribunal, but for the exercise of an election by a party to a suit in a State court, to transfer it to another court of original jurisdiction for trial. The design was to authorize an election between the two; not to give him a chance at both. And this object can only be accomplished by requiring, as the statute does, the application to be made before any trial or final hearing in the case. The object of the one statute was to prevent an appeal until every thing had

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been decided. The object of the other was to authorize a removal only before any thing had been decided.

It seems to me clear, therefore, that this case was not within the act of Congress, and that the order for removal was unauthorized. I am aware that the learned judge of the district court of the United States for this district has reached a different conclusion. His opinion upon the subject is published in the *American Law Register* for April, 1869. Upon this point he says: "If the cause had been finally determined by either judgment of the circuit court, or by order of the supreme court; then the application for removal would not have been filed before 'the final hearing or trial.' But the last order of the supreme court reversing the judgment of the circuit court, and remanding the cause to that court for further proceedings according to law, opened the whole case to litigation, the same as if no judgment had ever been rendered. The supreme court in effect ordered a *venire facias de novo*, which required the circuit court to hear the cause as if no hearing or trial had taken place."

If this is so, then this court has been laboring under a great delusion. If, after a case has been three times in this court, twice on appeal from final judgments in the court below, if after the essential vital legal questions upon which its decision depends have been solemnly adjudicated by this court, and the cause remanded to the circuit, it starts there anew with nothing settled, "the whole case opened to litigation, as if no judgment had ever been rendered," then are not only our labors fruitless indeed, but those of the unfortunate litigants in the State courts are vainer than the labors of Sisyphus.

We have not so understood the law. We have uniformly applied to our decisions, so far as relates to matters within our jurisdiction, the same rule which the supreme court of the United States applies to its decisions; and have held that they become the law of the case, binding on the parties and the subordinate courts, and that the questions decided are not open to further litigation. We cannot have erred in this, unless the decisions of this court constitute an exception to the rule by which those of all other courts are governed.

I cannot but regret that this difference of opinion has arisen between this court and the learned judge of the district court. It may be the cause of much embarrassment and expense to the parties. But inasmuch as the difference does exist, I know of no way to avoid its consequences, whatever they may be. There seems but one course open to this court, consistent with its duty to itself and to the State, when its appellate power is invoked in the regular course of judicial proceedings, and that is, to exercise the jurisdiction which it believes itself to possess, according to its best judgment, whether that be well or ill founded.

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The remainder of the opinion relates to the question whether it is competent for Congress to authorize a non-resident plaintiff, who has voluntarily brought his suit in the State court, to obtain a removal. See 8 *Am. Law Reg. N. S.* 558.

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Circuit Court, Sixth Circuit; Eastern District of Michigan, June T., 1869.

TAXATION OF COSTS.—WITNESS FEES.

The fact that the deposition of a witness has been taken upon a *dedimus potestatem*, and is on file, forms no objection to the allowance of the travel fees of such witness, in the taxation of costs, if he attended and was examined in person.

Under the fee bill of February 5, 1858, as well as under former laws, the successful party is entitled to tax travel fees of a witness who resides out of the State and more than one hundred miles from the place of trial, and who attends voluntarily, upon mere request.

Question of taxation of costs.

After the trial of this action, a question arose as to the amount to be allowed in the taxation of costs for the traveling fees of a witness,—Stafford. This witness resided in another district,—New York,—and more than one hundred miles from the place of trial. He was not subpoenaed, but attended voluntarily at the request of the plaintiffs.

The defendant objected to the allowance of traveling fees of the witness from his residence to the place of trial, and for returning :

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1st. Because his testimony by deposition had been taken and filed in the case.

2nd. Because the witness was not served with subpoena.

3rd. Because the travel was from beyond the district, and more than one hundred miles from the place of trial.

Alfred Russell, for the plaintiffs.

Charles L. Atterbury, for the defendant.

WITHEY, J.—The first objection is not allowable. If a witness is present at the trial his deposition ought not to be used. If the testimony was material, the party had a right to have the witness present before the court and jury, if his attendance could be procured.

The second objection is not well made, and that and the third will be considered together. If a witness resides in another State, and more than one hundred miles from the place of trial, a subpoena cannot be made effective ; its service will be useless ; it will afford no ground for an attachment. Is a party, therefore, obliged to take out a commission to take his testimony ? or if the personal presence of the witness be deemed essential, and it can be procured, is the party deprived of the benefit of the act of 1853, which allows witnesses' fees for each day's attendance in court, one dollar and fifty cents, and five cents per mile for traveling from his place of residence to said place of trial, and five cents per mile for returning ?

Both questions are answered in the negative. No rule of court and no construction can properly be allowed to override the plain language and obvious import of this enactment. Under the act of 1799, it was held that traveling fees were allowable from the resi-

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dence of the witness, although without the State, and more than one hundred miles from the place of trial. 3 *Story C. Ct.* 84. Before the passage of the act of 1853, it was held (5 *McLean*, 241), under the act of 1799, that, if the witness "attended voluntarily, or without summons, his fees cannot be charged against the losing party." This is but a literal rendering of the act of 1799, and, of course, it will bear the construction given it. That enactment allowed compensation "to witnesses summoned," and not, as in the act of 1853, "to witnesses for each day's attendance, &c.," without reference to whether the witness be "summoned" or not.

Clearly, under the act of 1853, a witness who attends by procurement of a party because his testimony was deemed material, is entitled to the *per diem* of one dollar and fifty cents, and traveling fees from his place of residence, and for returning, provided he actually traveled so far to reach the court, as it would be from his residence to the court.

The taxation made in this case is proper.

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SHUFORD v. CAIN.

District Court ; Northern District of Georgia ; September T., 1869.*

PROCEEDINGS IN LAW AND EQUITY.—JURISDICTION.
—VACATING JUDGMENT.

The commingling of law and equity in the same proceeding, which is allowed in the State courts of Georgia, is unknown in the national courts held within that State. These sit distinctly as courts of law, or as courts of equity.

In modern practice the courts incline to allow a question of regularity in the proceedings in a cause to be raised and determined upon a motion in the cause, instead of requiring the party aggrieved to sue out a writ.

A circuit or district court has no jurisdiction to entertain an action brought by an indorsee of a promissory note where both the maker and the payee and indorser are citizens of the same State. As the payee could not have sued the maker, his assignee or indorsee cannot do so, under section 11 of the judiciary act of September 24, 1789. *So held*, notwithstanding the note was not negotiable in terms.

A judgment and subsequent proceedings, had in a circuit or district court, which are void for want of jurisdiction, may be vacated upon motion in the same court, notwithstanding the expiration of the term at which the judgment was rendered.

Motion to vacate a judgment and subsequent proceedings.

Mr. Hopkins, for the motion ;—Cited 16 *Pet.* 315 ; 2 *How.* 241 ; 5 *Id.* 290-1 ; 2 *Pet.* 556 ; 3 *Bac. Abr.* tit. Error ; 2 *Pet.* 556 ; 12 *Johns.* 434 ; 14 *Id.* 425 ;

* The district court for the northern district of Georgia has circuit court powers ; by act of August 11, 1848.

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14 *How.* 342; 2 *Id.* 58; 15 *Id.* 356; 14 *Id.* 345-6; 15 *Pet.* 119.

Mr. Weil, and Lochrane & Clark, in opposition;—
Cited 4 *Wash. C. Ct.* 895; 6 *Wheat.* 146; 11 *Pet.* 80;
Chitt. on Bills.

ERSKINE, J.—Elkanah Shuford, a citizen of the State of Alabama, brought *assumpsit* in this court against William C. Cain, as maker of a non-negotiable promissory note, and Joseph L. Grisham, as indorser of the same. The following is a copy of the note:

“On or before the first day of January, 1863, I promise to pay J. L. Grisham the sum of seven hundred dollars, for value received of him, with interest from twelve months, this 12th October, 1860.

“W. C. CAIN.”

The note was indorsed in blank by the payee, J. L. Grisham.

The writ was returnable at the March term, 1868. Service was acknowledged by defendants, but neither appeared. At the same term, judgment by default was taken, a verdict rendered and judgment final entered, upon which execution issued and was levied by one Dickson, a deputy marshal, on land as the property of Grisham.

Thus the matter stood until after the September term, 1868, when Grisham filed a bill, on the chancery side of this court, against Shuford and Dickson, to set aside the judgment, &c.; because, as alleged, the court had no jurisdiction of the subject matter of the action, both maker and indorser being citizens of Georgia when the note was made, and at the commencement of the action; that Grisham indorsed the note to one Galt, in part payment for a family of slaves purchased by

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him of Galt ; and that he, Grisham, when the suit was brought, had, and still has, a good defense to the note, but, being sick during the term, he was unable to make the defense. On these grounds,—and on others unnecessary to mention here,—he prayed that the sale of the land be enjoined. A hearing on the bill alone was had at chambers. The injunction was denied ; but the sale of the property was postponed, and time granted to defendants to demur, plead, or answer by the first day of the ensuing term, when the cause could be fully argued. Whereupon, counsel for Grisham asked for, and (no objection being interposed by defendants) obtained leave to file a motion on the common law side of the court—as ancillary to the bill, or in lieu of it. The motion was filed. It prayed, like the bill, that the judgment be annulled, and the *fleri facias* set aside, for reasons similar to those contained in the bill. Defendants filed no defense to either bill or motion. But (complainant making no objection) they were allowed to contend against the bill and motion, to the same extent as would have been proper had a demurrer been filed. In argument, they insisted that the former contained no equity, and the latter no law ; at least, neither equity nor law which could avail the complainant at that late day—he being barred of any supposed rights by his own laches ; and further, that the court had no power to enjoin the judgment, or to annul it, after the end of the term at which it was obtained. It was contended that the bill and motion are one proceeding ; or, if distinct and separate proceedings, both must be rejected as inapplicable remedies, or, if not so, as coming too late.

I am relieved from passing upon some of the propositions advanced and discussed, as Mr. Hopkins, counsel for Grisham, elected to submit his case on the common law motion alone. Had he relied on both bill and motion, some embarrassment might have arisen, for the

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question would have presented itself, whether a party, in asking an adjudication in a United States court, could blend a proceeding which is properly cognizable in a court of equity with one properly cognizable in a court of law.

The United States courts are courts of law and equity. And it is the duty of the judge to see that the course of the court,—whether it be the court of chancery, of admiralty, or of common law,—is not invaded or altered. He must take care to preserve it. *Const. Art. III. § 11*; *Bennett v. Butterworth*, 11 *How.* 669.

In the courts of many of the States,—Georgia, for example,—law and equity are, in a greater or less degree, blended. This commingling is unknown in the national courts. These, as courts of law, entertain suits in which legal rights are to be ascertained and determined in contradistinction to equitable rights. As courts of equity, they entertain suits in which relief is sought according to the principles, and, in general, the practice of the equity jurisdiction as established in English jurisprudence. *Parsons v. Bedford*, 3 *Pet.* 447; *Robinson v. Campbell*, 3 *Wheat.* 212; *United States v. Howland*, 4 *Id.* 108; *Pennsylvania v. Wheeling Bridge Co.*, 13 *How.* 519.

It was insisted, on the part of Shuford, that no relief could be given, in this particular case, upon a mere motion. But counsel did not name what he deemed a proper remedy, though he seemed to indicate that a suit of *audita querela* or *scire facias*, or a writ of error *coram vobis*, might possibly answer. The court will, however, leave the matter as it stands, and assume that a proceeding by motion is a suitable and also a not unusual remedy. This mode of investigating questions which are in their general features like these now under consideration, has, in modern days, been countenanced and adopted by the courts, by reason of being less expensive, and more simple and expeditious than

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those cumbrous and technically toilsome remedies just named. *Staniford v. Barry*, 1 *Aiken* (Vt.) 321; *Smock v. Dade*, 5 *Rand.* 639; *Gordon v. Frazier*, 2 *Wash.* (Va.) 130; *Johnson v. Harvey*, 4 *Mass.* 483; *Baker v. Judges of Ulster*, 4 *Johns.* 191; *Crawford v. Williams*, 1 *Swan*, 341, and cases there cited; *Ledge-wood v. Pickett*, 1 *McLean*, 143; S. C., 7 *Pet.* 144; *Wood v. Luse*, 4 *McLean*, 254; *Harris v. Hardeman*, 14 *How.* 334.

A rule is, that the same court which pronounced and entered up a final judgment cannot, at a subsequent term, vacate it for errors in law; this is the doctrine of the common law, and also of the supreme court of the United States. Some of the exceptions to the rule are, where the judgment was irregular, or where no notice had been served upon the defendant, or for fraud, or misprision of the clerk. But none of these faults are relied on by Grisham, in the proceedings instituted by him to set aside and annul this judgment. He asks for relief because, as he avers, this court had no jurisdiction of the subject matter of the cause; indeed, that cognizance of it was positively inhibited by section 11 of the judiciary act of September 24, 1789. This objection is, I apprehend, the main, if not really the only, question for determination.

It is admitted by the pleadings, and was not disputed in the argument, that the note was made in Georgia; that Cain, the maker, and Grisham, the payee and indorser, were then citizens of Georgia, and so continued to be, and were citizens of, and residing in this State, at the commencement of the action. Also, that Grisham, when the interlocutory and final judgments were obtained, had, and still has, a good defense against the note; but, by reason of his sickness, he could not make his defense. Upon what matters of law or fact these additional objections to the validity of the judgment were based, was not brought to the no-

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tice of the court. Nor, indeed, was it necessary to present them.

It was argued by the learned counsel for Shuford that this being a non-negotiable note, it was not within the prohibition contained in section 11 of the judiciary act. This position is, I think, untenable. The section does not confine the jurisdiction to negotiable paper.

If Grisham, the payee of this note, had indorsed it to A., a citizen of another State, A. could bring an action against Grisham to recover its contents ; for the indorsement of a non-negotiable note by the payee, ordinarily creates, as between him and the immediate indorsee, the same liabilities and obligations as are incurred by the indorsement of a negotiable note. But no action at law could be sustained by A. against Cain, the maker, without using the name of the payee, unless there was an express promise by the maker to pay A. *Story on Prom. N.* § 128, and note 4 ; *Burmester v. Hogarth*, 11 *Mees. & W.* 97 ; *Matlack v. Hendrickson*, 1 *Green (N. J.)* 262 ; *Gibson v. Cooke*, 20 *Pick.* 15 ; see 2 *Pars. on B. & N.* 44.

In *Young v. Bryan*, 6 *Wheat.* 146, it was held by the supreme court of the United States that a circuit court has jurisdiction of a suit brought by the indorsee of a promissory note, who was a citizen of one State, against the indorser, who was a citizen of a different State, whether a suit could be brought in that court by the indorsee against the maker or not. See, also, *Evans v. Gee*, 11 *Pet.* 80.

Now, if Shuford be the immediate indorsee of Grisham, the payee (and of this presently), he could, as just remarked, have instituted a suit in this court against the payee, but not against the maker. And even if the cause of action were a promissory note payable to order, the indorsee could not bring a suit here against Grisham and Cain, payee and maker, because his assignor, Grisham, could never have sustained an

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action in this court against Cain,—Cain and Grisham being citizens of Georgia. *Montalet v. Murray*, 4 *Cranch*, 46; *Coffee v. Planters' Bank of Tennessee*, 13 *How.* 183.

It was stated in the proceedings of file, that Grisham indorsed the note thus: "J. L. Grisham,"—to one Galt, and delivered it to him. If this be so, and the allegation was not denied or questioned,—the note being payable to a particular person only,—there has never been any privity in law between the subsequent holder, Shuford, and Grisham, the payee and indorser, or between the former and Cain, the maker. Consequently, Shuford could not bring a suit at law in his own name against Grisham and Cain, or against either of them. *Story on Prom. N.* §§ 128, 129.

Section 2,732 of the Code of Georgia, 1 ed., provides that the maker and indorser of a note may be sued in the same action. This mode of proceeding was adopted in the case at bar. The declaration contains one count. Independently of this provision in the code, no such joint action is maintainable under the well established rules of pleading; because the liabilities of the maker of a promissory note and an indorser are distinct and independent—the one being primary and immediate, the other secondary and collateral—and they cannot in a national court be sued jointly, but must be proceeded against in separate actions.

In *Keary v. Farmers' & Merchants' Bank of Memphis*, 16 *Pet.* 89, 94, Mr. Justice STORY, in giving the opinion of the court, said that it is not "competent for any State legislature to regulate the forms of suits or modes of proceeding or pleadings in the courts of the United States; but the sole authority for this purpose belongs to the Congress of the United States."

The circuit and district courts of the United States are courts of limited, but not inferior jurisdiction, and they cannot exercise any jurisdiction which is not ex-

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pressly, or by necessary implication conferred. But where they do possess jurisdiction they have a right to decide every question which occurs in the cause; and whether their decisions be correct or otherwise, their judgments are conclusive between parties and privies until reversed on error. If, however, they are without authority, their judgments are absolutely null, and form no bar to a recovery which may be sought, even prior to a reversal in opposition to them. This is the distinction between judgments which are voidable and those which are void. *Shriver v. Lynn*, 2 *How.* 43; *Harris v. Hardeman*, 14 *Id.* 334; *Carter v. Bennett*, 15 *Id.* 354; *Atkinson v. Purdy*, *Crabbe*, 551.

As has been already observed, Cain, the maker of the note, and Grisham, the payee, both being citizens of Georgia, the latter could not bring a suit in this court to recover the contents of the note against the former; for, by a provision in section 11 of the judiciary act, the jurisdiction is confined to cases in which "the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Nor could any assignee or indorsee of Grisham sustain a suit here against the maker, in the face of the following prohibition in section 11: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made."

Thus it will be seen that the present case falls directly within both of these clauses of the section. And with these facts before me, I cannot come to any other conclusion than that the rendition of the judgment was *coram non judice*, and therefore utterly void.

Counsel for Shuford contend, that if the court should be of opinion that the judgment, so far as it affects

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Cain, is void, it must nevertheless stand good as against Grisham.

On inspection of the record, the judgment is found to be against both defendants—"that the said plaintiff do recover against the said defendants his damages aforesaid," &c. This judgment, being an entirety, if void in part, is void in all; if annulled as to one of the parties, it must be annulled as to both. 2 *Saund.* 101; *Hemmenway v. Hickes*, 4 *Pick.* 497. But if the judgment could have been several, instead of joint, I cannot perceive how Shuford would be thus benefited.

As to the position that if Grisham ever had any rights, he came too late to assert them—the reply is: if the judgment is a nullity, he is in time. *Wood v. Luse*, 4 *McLean*, 254.

Ordered, that the judgment by default, the verdict and the final judgment be, and they are hereby declared null and void, and that the writ of *feri facias* be quashed. But the writ and declaration may remain before the court until 10 A. M., on the last day of the present term; and, in the mean time, the plaintiff, Shuford, may move for leave to amend, if he should be of opinion that the court has power to grant any amendment in the proceedings.

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UNITED STATES v. THIRTY-THREE BARRELS
OF SPIRITS.*District Court; District of Massachusetts, March T.,
1868.*

INTERNAL REVENUE LAW.—FORFEITURE.

To warrant a forfeiture of tools, implements, instruments, or other personal property, under section 48 of the internal revenue act of 1864, 13 *Stat. at L.* 240, as amended by the act of 1866, 14 *Id.* 111, upon the ground that they are found upon premises where an illicit manufacture is carried on, it should appear that such property was employed, or intended to be used in such manufacture, or was in some way connected with it.

Motion for a new trial.

This was an information filed against the contents of a building upon Central wharf in Boston, to enforce a forfeiture claimed under the internal revenue law. The property in question was claimed by John Lombard.

Upon the trial it appeared that the building in question was of four stories in height. In the attic story there was a still, and here, as the evidence indicated, a business of distilling had been carried on, in violation of the revenue law. The second and third stories contained barrels, chemicals, and other articles of a character adapted to be useful in the distilling business. The first floor was occupied by a retail grocery store, and contained a stock of goods such as are ordinarily kept for that business. The counsel for the government contended that the entire property found in the building

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was forfeited ; and the jury found a verdict condemning the entire property, accordingly.

The claimant now moved for a new trial and in arrest of judgment.

L. S. Dabney, for the motion.

W. W. Field, opposed.

LOWELL, J.—In this case there is a motion for a new trial, on the ground that the verdict is against the weight of the evidence, and a motion in arrest of judgment. The information, as amended, alleges in the fifth count that certain distilled spirits were found at number 45 Central wharf, Boston, in the possession, custody and control of one John Lombard, for the purpose of being sold by him in fraud of the revenue laws ; that two hogshheads of molasses were found at the same place in the possession of said Lombard, and were raw materials which he intended to manufacture into distilled spirits, for the purpose of fraudulently selling the same, and evading the taxes thereon, and that the other goods, wares, merchandise and property seized, which appear to form the stock, furniture and fixtures of a retail dealer in liquors and groceries, were tools, implements, instruments and personal property found at the same time and in the same building with the spirits and the molasses, and in the possession, custody and control of the said Lombard.

The other amended counts differ from the fifth count, in substance, only as to the person in whom the custody is alleged to be.

The law under which the information is brought is section 48 of the act of 1864, 13 *Stat. at L.* 240, ch. 173, as amended by the act of 1866, 14 *Id.* 111, ch. 184. As the act stood at first, all goods, &c. on which duties are imposed which shall be found in the possession, &c.

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of any person for the purpose of being sold or removed in fraud of the internal revenue laws, may be seized and shall be forfeited; and so of raw materials intended to be manufactured for the purpose of being so sold, and also all tools, implements, instruments and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles are found, *and intended to be used by them (i. e., the persons before mentioned) in the manufacture of such raw materials.* The new statute amends the phraseology of this section in several other particulars, without perhaps much variation of the meaning, but omits altogether the qualifications of intended use of the tools, implements, instruments and personal property, and upon a literal interpretation might seem to subject to seizure and forfeiture all goods and chattels and other things coming within the very general description of personal property, to whomsoever it may belong, if found in the same building, including out-buildings, yard, &c. with the offending goods.

It is impossible to believe that any such sweeping condemnation is intended to be passed, founded upon mere proximity in place, upon the goods of all persons innocent and guilty. In its application to a city or other busy place, where the same building is divided into numerous tenements, shops, offices, counting-houses and warerooms, all being often found under one roof, and each occupied by a different tenant, the operation of such a law would work the most enormous and unheard-of injustice. To take a single example, the money in the vaults of any bank might be forfeited for the fault of some petty trader in the attic of the banking house. It is a general principle of law as well as of natural justice, that statutes will not be understood to forfeit property except for the fault of the owner or his agents, general or special, unless such a construction is unavoidable. See *Peisch v. Ware*, 4 *Cranch*,

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347 ; Freeman v. Four hundred and three casks of Gunpowder, *Thacher Crim. Cas.* 14.

This information does indeed allege that the personal property sought to be confiscated was in the possession or under the control of the wrong doer. But even if the statute be limited in that way, it will be most arbitrary and unjust in its operation, for the punishment will bear no sort of necessary relation to the offense. The crime is punished by the very same section with a fine of five thousand dollars, or double the amount of tax ; but this forfeiture may be indefinitely greater than either. But the more valid reason against this construction is, that nothing in the statute itself points to the possession or control of this personal property as deciding its status, but only and solely the place where it is found. A forfeiture of the goods of the same owner, found with the unlawful goods, is not without precedent in revenue laws, and I was at first disposed to believe that such was the meaning of the statute, but upon a more careful inquiry, I am satisfied that the construction presently to be mentioned, is more consistent with the words of the law. By reason and analogy, as well as by the context, we find that some real connection with the fraud is intended to be attached to the property that is liable to seizure. The taxed articles and the raw materials intended to be manufactured, are the principal things, and the tools, implements, instruments and personal property, are only the connected incidents. I am of opinion that by the familiar rule of construction, called *noscitur a sociis*, we must restrict the general words personal property, by the more particular and immediately preceding words, tools, implements, and instruments. Such a restriction has been adopted in many well considered cases. Thus, where it was enacted that no tradesman, artificer, workman, laborer, or other person whatsoever, should do or exercise any worldly labor,

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business, or work of their ordinary callings upon the Lord's day, the court of king's bench held unanimously that this did not include drivers of stage coaches. *Sandiman v. Breach*, 7 *Barn. & C.* 96. So any artificer, calico printer, handicraftsman, miner, collier, pitman, keelman, glassman, potter, laborer, or other person who shall contract with any person whomsoever, for any time or times, does not include domestic servants. *Kitchen v. Shaw*, 6 *Ad. & E.* 729; 1 *N. & P.* 791.

Other examples of a restricted construction of the general words of a statute are *Rex v. Manchester Water Works*, 1 *Barn. & C.* 630; *Rex v. Mosley*, 2 *Id.* 226; *Coolidge v. Williams*, 4 *Mass.* 140; *Sprague v. Birdsall*, 2 *Cow.* 419. And in the construction of deeds and wills, it is not unusual to confine general expressions by a regard to the context. Thus, "all my estate of what kind soever," being connected with words referring only to chattels, was held not to pass real estate. *Sanderson v. Dobson*, 1 *Exch.* 141.

In the present case, the words "tools, implements, and instruments," are carelessly used, and are mere surplusage, if the general words "personal property" are intended to include them. Why mention tools and implements if everything but real estate is to be confiscated? And if any specification is desired, why not specify the property much more important and more likely to be found in such a connection,—namely, the stock in trade, notes, money, etc.,—before the general words? It cannot be doubted that the tools, implements and instruments here forfeited, are those with which the unlawful business is carried on; and if that is so, does not their enumeration exclude all other tools, implements, and instruments? If a carpenter's, tools, a surgeon's instruments, or a dressmaker's sewing machine are found in a distillery, can they be forfeited as tools, implements, and instruments? If not, and if they are tools and nothing else, how can they be

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swept in as "personal property"? It must be on the very ground that they are *not* connected with the fraud, and then the statute will read thus: "All tools, implements, and instruments of the unlawful business shall be forfeited, together with all other tools, implements, instruments and personal property which have no such connection." No fair, sensible or reasonable construction can be given to the particular words, without supplying the qualification which I have adopted; and when you have supplied that, it naturally restricts the operation of the more general words which follow, and the statute is read as forfeiting the tools, implements, instruments, and personal property connected with the illegal business, and found within the building, yard or enclosures where that business is carried on. This construction gives effect to all the language, because there are often many things connected with a trade or manufacture which are not properly described as either tools, implements, or instruments; as, for example, fuel, fixtures, etc.

This construction entirely relieves the difficulty concerning the place or building, yard or enclosure, because it is reasonable that all things which are part of the unlawful business which are found within the same enclosure, whether inside or outside of the building, should be forfeited, and that all articles-appropriated to such business which are so found, should be *prima facie* presumed to be connected with the fraud. This interpretation makes the whole law just, harmonious, and intelligible.

New trial granted.

MATTER OF MEADOR.

District Court; District of Georgia, August T., 1869.

ADMINISTRATION OF INTERNAL REVENUE LAWS.—
COMPELLING PERSONS TO TESTIFY.

It is not necessary, in order to support an application by a supervisor of internal revenue, for an attachment to compel a person liable to taxation to appear and testify and produce his books, &c. that the supervisor should appear to have acted, in issuing the summons, under any special instructions from the commissioner of internal revenue. The supervisor must obey any special instructions which are shown to have been given. But in the absence of proof of instructions, it will be presumed that his acts have been in pursuance of his official duty.

The extent of the powers of a supervisor of internal revenue to order persons chargeable with a tax to appear before him for examination, and to produce books and papers; and the powers of a district court to punish disobedience to such order as a contempt,—explained.

. Application for an attachment for contempt.

J. Milledge, District-Attorney, and *L. E. Bleckley*, for the motion ;—Cited 1 *Wm. Blacks.* 555 ; 4 *Bancr. Hist. U. S.* 414 ; Act of July 13, 1866, § 9, 14 *Stat. at L.* 102 ; § 14, *Id.* 151 ; *Conkl. Tr.* 740 ; Act of July 20, 1868, 15 *Stat. at L.* 125 ; Act of 1831, 4 *Id.* 457 ; 3 *Am. Law Rev.* 641.

O. A. Lochrane, and *L. J. Gartrell*, in opposition ;—Cited 3 *Blatchf.* 148 ; 5 *Taunt.* 260 ; Act of March 2, 1831 ; *Bright. Fed. Dig.* 94, 166, 168, 189 ; 1 *Neo. & M.* 725 ; 2 *Dall.* 333 ; 1 *Cranch C. Ct.* 580 ; *De Lome*, 89, note ; Writs of Assistance ; Internal Revenue Acts 1866-'67, 286 ; *L. R.* 417 ;

Matter of Meador.

Law on U. S. Cts. 47; *Code of Ga.* 995; *Hurd on H. C.* 325-328; 11 *Eng. L. (Each.)* 290; *Pet. C. Ct.* 291.

ERSKINE, J.—The supervisor of internal revenue for the States of Florida and Georgia issued a summons against each of the members of the firm of Meador & Brothers, dealers in tobacco, in Atlanta, Georgia, under a provision contained in section 49 of the act of Congress of July 20, 1868, requiring them to appear before him, at his office, at a certain time, and to testify under oath, and to produce their books, papers, &c. relating to any business transacted by or through them, from July 20, 1868, to July 1, 1869. The foregoing is only a synopsis of the contents of the summons. The parties were duly served, but failed to appear or to produce their books before the supervisor. He then made application to me, in pursuance of a provision contained in section 9 of the act of July 13, 1866, 14 *Stat. at L.* 102, for an attachment against the Meadors. But, before it was issued they voluntarily appeared; an attachment *nisi* was granted and time given to them to show cause why it should not be made absolute. On the return day, they appeared, and by their counsel, Gartrell and Lochrane, placed their defense on file. It is in substance as follows:

First. That so much of the act of July, 1868, as grants authority to a supervisor to compel persons to testify and to produce their books, &c. in an imaginary case, is unconstitutional and void.

Second. If constitutional, still the supervisor can only proceed to compel the production of books, &c. in the same manner and to the same extent as assessors can do; and that neither “can compel persons to testify and produce their books, &c. in an imaginary case against parties residing out of their districts.”

Third. That section 49 of the act authorizing the

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supervisor to summon any person to produce books, &c. and to appear and testify under oath, is of no effect, "because the provisions of the act of July, 1866, for enforcing the summons are inconsistent with the provisions of existing laws for the punishment of contempts."

Fourth. That no order of punishment can be rendered in a case before the judge, for disobeying a summons to appear before a supervisor, as the act "directs that no order can be issued inconsistent with existing laws for the punishment of contempts, and by those laws no court or tribunal can punish for contempt, except as against violations of its own orders."

Fifth. That the powers here claimed by the supervisor "are judicial powers, and that the judiciary is expressly fixed by the constitution and previously existing laws—neither assessors nor supervisors forming any part of it."

During the argument, which was elaborate and able, additional propositions were advanced orally, and various objections were taken to the constitutionality of section 9 of the act of 1866, and section 49 of the act of 1868.

Section 49 of the act of 1868, 15 *Stat. at L.* 144, after providing for the appointment by the secretary of the treasury, on the recommendation of the commissioner of internal revenue, of certain officers, to be called supervisors of internal revenue, proceeds to define their duties and powers as follows: "It shall be the duty of every supervisor of internal revenue, under the direction of the commissioner, to see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with; to aid in the prevention, detection, and punishment of any frauds in relation thereto, and to examine into the efficiency and conduct of all officers of internal revenue within his district; and for such purposes, he shall have power to

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examine all persons, books, papers, accounts, and premises, and to administer oaths and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel a compliance with such summons in the same manner as assessors may do," &c.

The mode by which assessors may compel a compliance is pointed out in section 9 of the act of 1866: "In case any person so summoned shall neglect or refuse to obey such summons, or to give testimony, or to answer interrogatories as required, it shall be lawful for the assessor to apply to the judge of the district court or to a commissioner of the circuit court of the United States for the district within which the person so summoned resides for an attachment against such person as for a contempt. It shall be the duty of such judge or commissioner to hear such application, and, if satisfactory proof be made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing, the judge or commissioner shall have power to make such order as he shall deem proper, not inconsistent with the provisions of existing laws for the punishment of contempts, to enforce obedience to the requirements of the summons and punish such person for his default or disobedience."

At the opening of the proceedings, Mr. Milledge, United States attorney, stated that he held a letter of instructions from the commissioner of internal revenue to the supervisor, dated June 11, 1869, and added that it was desirable it should be read to satisfy the Meadors that it was not idle curiosity, but duty, that guided him in issuing the summons. It was produced and read.

The substance of the letter was, that certain officers of the internal revenue department had been in Georgia,

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examining with reference to the affairs of certain dealers in tobacco, snuff, &c., whose factories in Virginia and North Carolina had been seized, and that the assessor at Atlanta was instructed to procure information from agents of the tobacco houses in question, which it was necessary to use in connection with the cases in which the officers referred to were engaged. He is then instructed to obtain from the books, &c. of these agents,—whose names would be furnished to him by the said assessor,—the information needed by the said officers, and forward it to them, at Richmond, Virginia.

It was argued for the Meadors that the provision in the act giving power to the supervisor to compel persons to testify under oath before him, and to produce their books, papers, &c. for his inspection, in an imaginary case, is unconstitutional and void.

Admit the assumption—directly or hypothetically—does it therefore follow that the law is unconstitutional? If this is an “imaginary case”—a mere visionary fancy emanating from the brain of the supervisor—it ought not to be countenanced; for a proceeding of this kind might prove little less hurtful to the mercantile interests of the Meadors than one begun and prosecuted to gratify sinister inquisitiveness or mischievous espionage, and not *bona fide*, and for the public good. Moreover, to institute a proceeding or action, not to determine a right or controversy, but to deceive the court and raise a prejudice against third persons, is a contempt. *Coxe v. Phillips, Ca. Temp. Hard. 237*; S. C., *3 Hawk. P. C. 229*.

But after a careful perusal of the statute and the letter of the commissioner (which letter is in evidence), my mind is satisfied that this proceeding is not in an imaginary case; but that, on the contrary, there was sufficient cause for the issuing of the summons by the supervisor, and that his action in the premises was warranted by the statute. If so, then this proceeding

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is legitimately here. Under direction of the commissioner, it is the duty of the supervisor to aid in the prevention, detection and punishment of any frauds in reference to the collection of internal revenue. The commissioner informs him that certain tobacco factories had been seized in Virginia and North Carolina ; and directs him to procure the names of the agents of those factories, and to ascertain from their books, papers, &c. information needed by certain internal revenue employees or officers, touching the factories seized. Upon these instructions he seems to have acted.

But it must not be imagined from what has been just said that either written or verbal instructions are necessary before the supervisor can issue a summons under section 49 of the act of 1868. Congress did not so intend to limit his authority and usefulness. True, he must obey and follow the instructions of the commissioner when given. He must also act in good faith. And a public officer is presumed to act in obedience to his duty, until the contrary appears.

The ruling on this point being adverse to the Meadors, the proceedings, with the exception of, perhaps, some brief details, might end here ; so far, at least, as the constitutionality of the provision in section 49 of the act of 1868, has been impugned. For, if this provision is void, when there is no real case, the presumption is fair that it is constitutional and valid, when the case is not an imaginary one.

Another point was presented and discussed, namely : That, granting the constitutionality of the provision, still, the supervisor can only proceed to compel parties to appear, testify or produce their books, &c. in the same manner, and to the same extent as assessors can do ; and that neither can compel them to do any of these acts, in an imaginary case against persons residing out of his (the supervisor's) district.

Section 49 declares that it shall be the duty of the

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supervisor to aid in the prevention, detection and punishment of any frauds in relation to the collection of internal taxes, and to examine into the efficiency and conduct of all officers of internal revenue within his district.

For what purpose were the powers in question conferred upon the supervisor? The act says to aid in the prevention, detection, and punishment of any frauds in relation to the collection of taxes. There are no words in this clause—nor can any be imported into it—restricting the operation and effect of the supervisor's action to the territorial boundary of his district. True, his action is within his denominated district; but the legal consequences of the action may affect persons or things elsewhere. The next clause confers on the supervisor powers distinct and different from these, namely, to examine into the efficiency and conduct of the revenue officers within his district. And on this point I concur with the counsel for the Meadors. I likewise agree with them, that the supervisor can compel the production of books, &c. only in the manner and to the extent that an assessor can, under section 9 of the act of 1866. When either issues a summons, and the party served neglects or refuses to appear, to testify under oath, or to produce his books, &c. the power of each—the one as assessor, and the other as supervisor—is exhausted. For remedy, to compel compliance with the exigencies of the summons, he must make application in the manner provided in the section last referred to, to a judge or a commissioner.

Even on the hypothesis that this is an imaginary case, it is yet due to counsel on both sides, that the clauses cited from section 49 of the act of 1868, should receive a construction to the extent of their argument. Counsel for the Meadors insisted that section 49, empowering the supervisor to summon persons to appear, produce books, &c. and to testify under oath, is of no

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effect, because the provision in section 9 of the act of 1866 is inconsistent with the provisions of existing laws for the punishment of contempts.

It may be borne in mind that the section just referred to gives the same power to the judge to punish for contempts when acting under the authority of these revenue statutes as is possessed by the national courts themselves.

Congress, deriving authority from the constitution to ordain and establish courts of justice subordinate to the supreme court, has hitherto conferred upon these courts such jurisdiction as it has thought proper to bestow ; but there still lie dormant in the national legislature vast and various powers which only await the exigency, essential to call them into action.

Notwithstanding the jurisdiction of the national courts—supreme and inferior—is limited ; they yet possess powers not granted by positive law ; not independent, but auxiliary. For instance, although they have been vested by statute with power to inflict punishment for contempts (act of 1789, modified, after the impeachment of Judge Peck, by the act of 1831), still it does not follow, either from the peculiar constitution of these courts—their limited and defined powers—or the statutes declaratory of these powers, that they could not exercise the same authority without the aid of acts of Congress ; for the right to inflict summary punishment for a contempt is an inherent one, and indispensable to all courts of justice.

Chief Justice MARSHALL, in the case of *United States v. Hudson*, 7 *Cranch*, 32, said : “ Certain implied powers must necessarily result to our courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—enforce the observance of order, &c. are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others ; and so far, our courts no doubt possess powers not immediately derived from statute.”

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Section 1 of the act of March 2, 1831, empowers the several courts of the United States to issue attachments and inflict summary punishment for contempts of court, but this power shall not extend to any cases except, &c. . . . "and the disobedience or resistance by any officer of said courts, party, juror, or witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts." See also the act of 1789.

Unlike those courts which have their origin in the common or unwritten law, the courts of the United States are created by written law. In the former, the jurisdiction is general, and all the proceedings brought before them are presumed to be within their cognizance until the contrary appears. In the latter, the jurisdiction is limited and defined, and they can take cognizance of such proceedings only as are affirmatively shown to be within their jurisdiction. Yet they possessed certain unexpressed powers incidental and appurtenant to all courts of adjudicature.

Comparing the provision of section 9 of the act of July, 1866, with the act just quoted and the act of 1789 referred to, I have failed to perceive wherein section 9 is inconsistent with either of those statutes. The powers granted by those acts are, I apprehend, sufficiently ample to enable the judge to carry into effect the provisions of section 9 of the act of 1866.

It was insisted that no court or tribunal could punish for contempt, except for violations of its own orders. This, as a general proposition, is correct. But, in proceedings under section 9 of the act of 1866, the question of contempt would arise for consideration only when some process or other lawful command of the judge was disobeyed.

It was contended, also, that the authority claimed by the supervisor to issue summons, requiring persons to appear before him, is a judicial act. That issuing a

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summons and requiring persons to appear, testify under oath, produce books, &c. may be, if taken in an extended sense, a judicial act, must, I think, be admitted. But the mere issuing of a summons is in itself only a ministerial act. Nor did Congress in using the term "summons," in section 49 of the act of 1868, contemplate it to be of the legal dignity of a writ, or other judicial process; but simply a notice—and similar in its nature to a summons issued by an overseer of roads requiring persons to attend, with the necessary implements, and to work on the public highway. His summons, as has already been said, neglected or disobeyed, his authority ends. He must then apply to the proper officer, as directed by section 9 of the act of 1866, to enforce obedience. And when the alleged delinquent is brought before the judge, he will "proceed to a hearing of the case"; and then, and not till then, can it be properly said that there is any exercise of judicial authority.

There exists in every political sovereign community the inherent power of guarding its own existence and protecting and exalting the happiness and welfare of its people at large. This sovereign power is known as the *eminent domain* of the nation or State, and embraces the power to appropriate the acquisitions of its subjects or citizens to public purposes, and to control and preserve the relations of social life—internal polity or police, public health and public morals.

Generic with the power of *eminent domain* is the power of taxation; each is essentially a sovereign attribute, lodged in the aggregate of the people. When the right of *eminent domain* is exercised, it appropriates property exceeding the owner's share of contribution to the public burden. Taxation is the proportional and reasonable assessment which may be imposed from time to time upon persons or property. The national constitution prohibits the taking of private property for

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public use without just compensation. The tax-payer receives a full and just compensation for his share of contribution to the public necessity by the benefit conferred on him, in the proper appropriation of the tax paid.

Notwithstanding these two powers have, in my judgment, a common origin, both being inherent in the sovereign authority—the object of both being the safety and welfare of the whole community—yet the weight of authority would seem to be that there exists a distinction between these two modes of taking individual property for public use. *West River Bridge Co. v. Dix*, 6 *How.* 507; *Brewster v. Hough*, 10 *N. H.* 138, in which it was held “that the power of taxation is essentially a power of sovereignty, or *eminent domain*.” But see *Commonwealth v. Alger*, 7 *Cush.* 53; and *Williams v. Mayor of Detroit*, 2 *Mich.* 560. The direct question has not—at least so far as my knowledge extends—been decided by any of the national courts. See *State of New Jersey v. Wilson*, 7 *Cranch*, 164; *Charles River Bridge v. Warren Bridge*, 11 *Pet.* 420, 640, STORY, J.; *Gilman v. City of Sheboygan*, 2 *Black*, 510. But whether there is any substantial difference in principle is not here a question requiring determination. It is enough for me on this occasion to declare that Congress has not made any provision for trial, by jury, whether property be taken by right of *eminent domain*, or by authority of the taxing power.

It is, nevertheless, unquestionable that when the government appropriates individual property for public purposes, the obligation to make just compensation is concomitant; but Congress is the sole judge of how the compensation shall be ascertained and paid. And as to the executorial and summary modes employed for the collection of taxes—fixed debts due to the government—although they cause a certain diversity in “the law of the land,” and although such proceedings have

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been sometimes questioned, as infringing the right of trial by jury; nevertheless, it is, at this day, too well settled in this country—and in England from time immemorial—to be now disputed. Moreover, the collection of the excise or public taxes has never been deemed a judicial, but simply a ministerial act. *Murray v. Hoboken Land & Improvement Co.*, 18 *How.* 272; *Peirce v. City of Boston*, 3 *Metc. (Mass.)* 520.

Out of the provision in section 49 of the act of 1868, empowering a supervisor to examine premises, and to issue summons requiring persons to appear before him, testify under oath, produce their books, papers, &c.—and that part of section 9 of the act of July, 1866, which provides the mode of compelling obedience to the summons—two questions arise for adjudication. The one is based upon the fourth amendment to the constitution, which says “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing, to be seized.” The other is found among the enumerated private rights in the fifth amendment, and is as follows: No one shall “be deprived of life, liberty, or property, without due process of law.”

The rights of personal security, personal liberty, and private property—and incidentally, the near identity of writs of assistance and general warrants to the summons issued by the supervisor, were fully discussed.

The introduction into the constitution of the provisions in regard to search warrants, was doubtless occasioned by the strong feeling excited both in England and America, from the practice of issuing general warrants on bare suspicion and without foundation, empowering the officer to enter and search any house, to break open any receptacle, seize and carry away all

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or any private papers or other property. These abuses had continued for many years until, at length, in 1765, the court of king's bench (then presided over by Lord CAMDEN), in the case of *Entick v. Carrington*, 2 *Wils.* 275, declared them to be manifestly illegal. *Vide* *Huckle v. Money*, *Id.* 205; *Money v. Leach*, 1 *W. Blacks.* 555; *Commonwealth v. Dana*, 2 *Metc.* 329; *Story on Const.* § 1901. Several years anterior to the decision in *Entick v. Carrington*, the illegality of general warrants had been eloquently maintained by JAMES OTIS, in Massachusetts, in the discussion had respecting writs of assistance. The writer of an able article on Mr. OTIS in the July number of the *American Law Review* (1869), gives a brief history of these writs, derived from notes to *Quincy's Reports*, by Mr. Justice GRAY, of the supreme judicial court of Massachusetts. A copy of this writ may be found in the article. It authorized the person to whom it was issued to enter, accompanied by a sheriff, justice of the peace, or constable, any house, where uncustomed goods were suspected to be concealed; and, if resistance was made, the writ empowered the searcher to break open the house and seize the goods. These writs, modified in some degree, are still of force in England. 3 *Am. Law Rev.* 641; 4 *Banc. Hist. U. S.* 414.

Counsel for the Meadors contended that, if there was any distinction in principle between general search warrants or writs of assistance and the power claimed by the supervisor to enter and examine premises, and to issue summons requiring persons to appear before him, &c., there was no difference in their practical effect—each being repugnant to the constitution, and all equally illegal.

The first point in the question presented for decision, is as to the right of the supervisor to *enter and examine the premises*. This power, as already noticed, is given by section 49 of the act of 1868, and no war-

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rant whatever is made necessary before entry and examination.

Sir WILLIAM BLACKSTONE, speaking of the excise duty, which is an inland imposition upon commodities, charged, in some cases, on the manufacturer, and in others, on the seller or dealer in the manufactured articles, and answering substantially to our system of internal revenue or taxes, says: "The frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary, wherever it is established, to give the officers the power of entering and searching the houses of such as deal in excisable commodities at any hour of the day, and, in many cases, the night likewise." 1 *Blacks. Com.* 318. Such was the law of England and of the colonies prior to the war of independence, and so it has continued to this day under the national government, and in nearly every State of the Union; and the validity of this apparently rigorous law, in its application to the inland revenue and the collection of taxes, has never yet been successfully questioned. *Vide* Act of March 3, 1791, 1 *Stat. at L.* 139; Act of May 8, 1792, *Id.* 267; Act of July 22, 1813, 3 *Id.* 22, &c.

The second point in the question for determination involves the right of the supervisor to issue summons requiring persons to come before him, to testify under oath, and to produce their books, &c., for his inspection. The legal principles which govern the first point in this question are so closely blended with those which control the second, that the answer given to the first might suffice for this.

The objection made to the power given to the supervisor by the statutes is, as just mentioned, that it is forbidden by the fourth amendment to the constitution. But this is a civil proceeding, and in no wise does it partake of the character of a criminal prosecution; no offense is charged against the Meadors. Therefore, in

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this proceeding, the fourth amendment is not violated. Said MERRICK, J., in pronouncing the judgment of the court in *Robinson v. Richardson*, 13 *Gray*, 454: "Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right; but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals." *Murray v. Hoboken Land & Improvement Co.*, *supra*; 1 *Bish. Crim. Pro.* § 716. I do not perceive any likeness in principle between the summons issued by the supervisor and either general warrants or writs of assistance.

The second question in this branch of the case grows out of that important private right secured to the citizen by the fifth amendment, that he shall not "be deprived of life, liberty, or property, without due process of law." This provision is deduced from its grand original, chapter 29 of the Great Charter, which protected every individual in the free enjoyment of his life, his liberty and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land. By "law of the land" was probably meant the ancient Saxon common law.

In *Murray v. Hoboken Land & Improvement Co.*, *supra*, it was said by CURTIS, Justice, in delivering the judgment of the court: "The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land.'" If the converse of this be true, the phrase, "by the law of the land," imports a meaning as comprehensive as "due process of law," and consequently includes, like the latter, trial by jury. But neither—even in an enlarged sense—means that, to deprive a man of his life, his liberty or his property by means of the law in its regular administration through courts of justice, the

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intervention of a jury is, in all cases, necessary. Take, for instance, the case of a person indicted for a capital or other offense, and who, on arraignment, instead of pleading "not guilty" to the charge, elects, for reasons satisfactory to himself, to plead "guilty;" if the indictment be sufficient in law, the court awards judgment against him; and this is judgment "by the law of the land," and as lawful under the constitution as if he had been tried and found guilty by the judgment of his peers. So, if a person stands in contempt of the court, the court summarily punishes him by fine and imprisonment, or either, thus depriving him of his property, or liberty, or both, without a trial by jury. And it may be remarked that if the imprisonment be for a time certain, executive pardon is the only mode of releasing him, before the expiration of his sentence. So, in cases of demurrer or special verdict, or where a person makes default, or confesses judgment; and so, too, in equity causes, where trial by jury is quite unusual, men are deprived of their property. Other instances could readily be given to show that the words "by the law of the land," "due process of law," do not necessarily import a jury trial as essential in every case to deprive a person of his life, liberty or property. Indubitable proof of this may be found in the case of *Murray v. Hoboken Land & Improvement Co.*, *supra*.

That case arose out of the act of May 15, 1820, 3 *Stat. at L.* 592. The main question was, whether the issuing, by the solicitor of the treasury, of what was denominated in the statute a warrant of distress, against a defaulting collector of revenue, was in conflict with the constitution. The court held the law to be valid, and not inconsistent with the constitution. The decision was placed mainly on the ground that the ancient common law of England recognized a summary remedy for the recovery of debts due to the govern-

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ment. See *Martin v. Mott*, 12 *Wheat.* 19; *United States v. Ferreira*, 13 *How.* 40.

It was further insisted that the power given to the supervisor is violative of that clause in the fifth amendment to the constitution which declares that no one shall be compelled in any criminal case to be a witness against himself. This clause, like that in the fourth amendment in reference to search warrants, is applicable to criminal cases only.

And here a thought suggests itself. As the Meadors, subsequently to the passage of this act of July 20, 1868, applied for and obtained from the government a license or permit to deal in manufactured tobacco, snuff and cigars, I am inclined to be of the opinion that they are, by this their own voluntary act, precluded from assailing the constitutionality of this law, or otherwise controverting it. For the granting of a license or permit—the yielding of a particular privilege—and its acceptance by the Meadors, was a contract, in which it was implied that the provisions of the statute which governed, or in any way affected their business, and all other statutes previously passed, which were *in pari materia* with those provisions, should be recognized and obeyed by them. When the Meadors sought and accepted the privilege, the law was before them. And can they now impugn its constitutionality or refuse to obey its provisions and stipulations, and so exempt themselves from the consequences of their own acts?

These internal revenue or tax laws were characterized as being not only repugnant to the constitution, but also unreasonably burdensome. With the most minute attention I examined those portions of the acts of July 13, 1866, and July 20, 1868, presented for my consideration; and carefully sought to ascertain whether they were in conflict with any of the provisions of the constitution. My conclusion on that question has been expressed. I do not concur with counsel, that these

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laws are unreasonably burdensome. But even if they are, nay, even if they are oppressive, and unjust modes are employed for their enforcement, the remedy lies with Congress, and not with the judiciary. By enacting these laws Congress has exercised the constitutional power of taxation, and the courts have no power to interfere. *Providence Bank v. Billings*, 4 *Pet.* 514; *Extension of Hancock Street*, 18 *Penn.* (6 *Harr.*) 26; *Kirby v. Shaw*, 19 *Id.* 258; *Livingston v. Mayor, &c. of New York*, 8 *Wend.* 85; *Matter of Opening Furman Street*, 17 *Id.* 649; *Herrick v. Randolph*, 13 *Vt.* 525. In *McCulloch v. State of Maryland*, 4 *Wheat.* 316, 430, Chief Justice MARSHALL said, that it was unfit for the judicial department to "inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

Thus it will be seen that there are many cases in which the right of property must be made subservient to the public welfare. The maxim of the law is, that a private mischief is to be endured rather than a public inconvenience. On this ground rests the right of public necessity. 2 *Kent*, 336. And it is well to bear in mind that the national government is supreme within its constitutional limits, for to it is intrusted the paramount interest of the whole nation.

In declaring and carrying into effect the laws, my action, as a judge, will ever be "to use the least possible power adequate to the end proposed." Yet, let no one hesitate to do homage to the law; the very least as feeling her care, and the greatest as not exempted from her power.

Order.—It is ordered that the said John T. Meador, Newton J. Meador, and James G. Meador, composing the firm of Meador & Brothers, dealers in tobacco, in obedience to the summons of the supervisor, appear forthwith before him, and answer under oath, touching

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the receipt, storage, delivery or sale by the firm of Meador & Brothers, between July 20, 1868, and July 1, 1869, of any and all tobacco which came to their possession, or under their control in the way of business, during said period. And, also, that they, at the same time, produce to the said supervisor all books and papers of said firm, specified in said summons, which contain any entry, statement, or communication touching or in any way relating to tobacco.

And it is further ordered, that the clerk file this opinion in his office, and, that on payment of his fee, he furnish to the supervisor a copy of the same certified under his official seal.

NOTE.—An application was made, a few days after the above determination, by the defendants' counsel, for a writ of error, and a *superseas*. Objection was made in behalf of the government, that no provision of law existed whereby a writ of error would lie to a decision made by the judge in a proceeding of this nature out of court, and whilst he was sitting simply as judge under the revenue acts of 1866 and 1868.

The objection was sustained and the application denied.

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SCOTT'S CASE.

District Court; Northern District of Ohio, 1869.

BANKRUPTCY.—PRIORITY OF LIENS ON VESSELS.

Courts of bankruptcy will, in general, give effect to liens according to priority of date.

Maritime liens, which by the law of the admiralty would take precedence over charges of an earlier date, may, however, be accorded a similar preference in a court of bankruptcy.

A lien for supplies, &c. furnished to a vessel, founded upon a State statute, and not of a strictly maritime character, may be recognized and enforced, in a court of bankruptcy; but it cannot relate back, as a maritime lien may do, so as to take priority over a mortgage recorded prior to the creation of such lien.

Exceptions to the report of a commissioner in bankruptcy.

In 1867, Dwight Scott was the sole owner of two propellers, the S. D. Caldwell and the Ironsides. In June, 1868, both vessels were libeled, at Cleveland, for debts which were liens; and they were sold by order of the district court. Previous to the sale of them, Scott filed a petition in bankruptcy and was adjudged a bankrupt. After the sale of the vessels, the demands upon which the libels were founded, were paid out of the proceeds, and the balance was paid over to the assignee in bankruptcy.

Motions were then made in the proceedings in bankruptcy to distribute these proceeds among the different lienholders; and the case was referred to a special

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commissioner to report on the claims and their priorities.

The cause now came before the court upon exceptions to the report of the commissioner.

The principal question made was, upon the relative priority of claims arising upon mortgages upon the vessels, and claims for supplies, &c. furnished under the "watercraft law" of the State of Ohio.

Willey & Cary, for the mortgagees.

R. P. Ranney, S. Williamson, Mr. Backus, Estep & Burke, J. T. Carran, S. O. Griswold, and Mr. Wyman, for the various claimants under the watercraft law.

SHERMAN, J.—Under the bankrupt law the court is bound to recognize and enforce all valid liens; and the estate of the bankrupt passes to the assignee, subject to all liens that were subsisting upon it or its proceeds. The inquiry is therefore a proper one: What were the valid and subsisting liens, and their order, at the time the proceeds came into the hands of the assignee?

From the character of the claims presented, and the difficult questions of priority arising in the cases, on application of the parties the motions were referred to J. D. Cleveland, Esq., as special commissioner, to inquire into, and report upon the various claims and liens presented, and the order of their priority. The commissioner in the discharge of his duty made an able and elaborate report on the various questions submitted to him, which, from its fullness and general accuracy, has certainly entitled him to great credit.

From that report and the proof it appears that the propellers Caldwell and Ironsides, one of eight hundred tons, and the other of twelve hundred tons, were both enrolled and licensed at the custom-house of the Cuya-

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hoga district, where Dwight Scott, the owner, resided, and were both engaged in commerce and navigation between Cleveland and other lake ports in different States, during the whole time, between the accruing of the earliest lien and the time they were seized, libeled and sold.

There were three classes of liens set up against the proceeds :

1st. Strictly *maritime liens*, such as seamen's wages, materials, supplies and repairs in ports of other States, for damages for collision, and for towage and wharfage in foreign ports. There was no question as to the validity and priority of these liens, and under former orders of the court they have been paid.

2nd. *Statutory Liens*.—That is, claims for supplies, materials, &c. which the laws of Ohio declare shall be liens upon vessels navigating the waters in, or bordering upon the State, and that they shall at once attach upon the accruing of the debt.

3rd. *Mortgage Liens*.—A mortgage on each propeller was given by Dwight Scott, the owner, in part, for the purchase money, and the mortgages were duly recorded according to the act of Congress of July 29, 1850, in the district of Cuyahoga, the home port of the vessels.

The question presented is, as to the priority of the statutory liens and the liens of the mortgages.

If the so-called watercraft laws of Ohio attached to these propellers, and had the force and effect that from their terms they were intended to have by the legislature, then unquestionably the statutory liens will have the preference. Authorities are cited, both in the Federal and State courts, to the effect that this class of liens should be recognized and declared valid, to take effect next after purely maritime liens. But on an examination of these authorities, I am satisfied that these liens were so recognized, by reason of the provisions of the act of Congress of February 26, 1845, 5 *Stat. at L.* 726,

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which reserved concurrent remedies, as given by the State laws, in proceedings against vessels navigating the western waters. Under that law, this class of claims was treated as a species of maritime liens, only inferior in their nature and precedence to liens allowed by the maritime law. Even the supreme court, about that time, under the power conferred upon it by Congress to prescribe forms and process, made the twelfth rule in admiralty, which provided that this class of claims, depending upon State statutes, might be enforced by proceedings *in rem* in the district court, as a court of admiralty. This rule was, however, afterwards repealed, but for reasons other than want of jurisdiction. The St. Lawrence, 1 *Black*, 522.

Previous to the act of 1845, the opinion was entertained and frequently asserted that the admiralty jurisdiction of the Federal courts did not extend beyond the ebb and flow of the tide, and therefore State laws and State courts governed and controlled all matters in controversy arising on the western lakes and rivers. The Thomas Jefferson, 10 *Wheat*. 428; The Orleans *v.* Phœbus, 11 *Pet.* 175; New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 *How.* 344. In view of the vast and rapid increase of commerce on those waters, the act of 1845 was passed, conferring admiralty jurisdiction on the district court as to claims against vessels navigating the lakes and waters connecting them, saving, however, to the parties, whatever concurrent remedy the common law might give them, and also such remedies as may be given by the laws of the States. Under this law, and with the ideas then universally prevailing, the doctrine grew up that the State laws could create and establish liens upon that description of property. However, as time progressed, and the want of uniformity and consistency in the State laws became manifest, the subject of jurisdiction over vessels navigating the lakes received more attention, and was

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more closely investigated. From the time of the case of *The Genesee Chief v. Fitzhugh*, 12 *How.* 443, 459, down to the cases of *The Moses Taylor*, 4 *Wall.* 411; *The Hine v. Trevor*, *Id.* 555; and *The Belfast*, 7 *Id.* 624, the opinion has been growing that the district court did not derive its admiralty jurisdiction over the western waters by reason of the act of 1845, but that it was always possessed under section 9 of the judiciary act of 1789. Finally, these doubts and opinions were settled at the late session of the supreme court, by a decision pronounced by Judge NELSON, in the case of *The Eagle*, 8 *Wall.* 15, to the effect that the act of 1845 was obsolete and of no effect, and that general jurisdiction in admiralty upon the lakes was conferred upon the district courts by the judiciary act of 1789.

It follows, as the result of that decision, that if admiralty jurisdiction was conferred upon the district courts by the original judiciary act, it is an exclusive jurisdiction, and that the State laws cannot create, upon property that is subject exclusively to admiralty laws, charges and incumbrances that in any way partake of the character and force of maritime liens, that might be superior to other charges or incumbrances of an older date. This opinion, so well considered, and so much in harmony, as it is, with the rulings of all the district courts along the lakes for years past, is decisive of the nature and character of these claims, and the force, and priority and effect, that will hereafter be given them in the courts.

In this connection, I may cite the decision of the supreme court of Ohio, in a very late case, of *The General Buell v. Long*, 18 *Ohio St.* 521, recognizing the principles laid down in the *Moses Taylor* and the *Belfast* cases, and adopting them as the latest and most authoritative law on this subject. Similar cases, involving similar principles, have lately been decided in New York, *Bird v. The Josephine*, 39 *N. Y.* 19; in

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Minnesota, *Griswold v. The Otter*, 12 *Minn.* 465; in Indiana, *Ballard v. Wiltshire*, 28 *Ind.* 341; and in Kentucky, *Stewart v. Harry*, 3 *Bush*, 438.

The judiciary act of 1789 saves to the parties all the concurrent remedies of the common law. The lien which the statutes of Ohio declare that these domestic claims shall have, is not a common law lien or remedy. It is the creation of the statutes. The State of Ohio, as between her own citizens, and upon property within her jurisdiction, has the authority to declare what claims or indebtedness shall or shall not be liens, and the force and effect of those liens upon property. She has by her statutes declared that the class of claims now in question shall be liens, and shall at once attach upon the property; at the time of the creation of the debt. This court, as a bankrupt court, recognizes these statutes, and would be governed by them as far as possible, in the disposition of the proceeds of property sold in the hands of an assignee. And if the question before the court was, whether these claims had a preference over a mortgage of a prior date executed and recorded according to the laws of Ohio, or over any other debt against Dwight Scott, the bankrupt, even if it were in judgment and execution levied on the propellers previous to the accruing of their claims, the court might order the payment of them out of their proceeds, before the mortgage and judgment were paid. It would do so, if the statute or the decisions under it had made them the first lien, for the State has full authority to discriminate by law and create preferable liens upon property, so far as these liens are created or given validity to by the State legislation. But the mortgages on these propellers were of prior date to any of these domestic claims. They are both dated and recorded in April, 1867. The claims bear date at different times from May, 1867, to May, 1868. The mortgages are both recorded in pursuance of the act of Congress of July

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29, 1850, which provides substantially that no mortgage of a vessel shall be valid against any person, except the mortgagor and his representatives, unless such mortgage shall be recorded in the office of the collector of customs, in the district where the vessel is registered or enrolled. By virtue of the mortgage, the mortgagees acquired a lien on the vessels to the amount named in them, and by the recording of them, they gave notice to the world, including these claimants, that such a lien existed. The mortgages are no more a maritime lien than these domestic claims are. The mortgages and claims are of equal validity, and both were a charge and lien upon the propellers, to be paid according to their priority of date. If the claims had been of a prior date to the mortgages, they would have had a preference, and been paid first out of the proceeds of the sale; but as they happened to be of subsequent date, they must give way to the mortgages.

That Congress has the power to give validity to mortgages on vessels, by authorizing their record in the office of the collector of the customs in the home port, has been repeatedly settled. Under the power given in the constitution to regulate commerce, Congress having created, as it were, this species of property, and conferred upon it its chief value, there can be no reason why that power should not be extended to the security and protection of the rights and title of all persons dealing therein. *Blanchard v. The Martha Washington*, 1 *Cliff.* 463; *White's Bank v. Smith*, 7 *Wall.* 646.

The conclusion I have arrived at may seem to be in conflict with the decisions in *Kellogg v. Brennan*, 14 *Ohio*, 72, and *Provost v. Wilcox*, 17 *Id.* 359, wherein it is held that the claims of creditors for supplies and materials to a vessel, are, under the watercraft laws of Ohio, to be preferred as against a mortgage. These decisions were made in 1846 and 1848, and previous to the act of Congress of July, 1850, and the question in those cases

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was between the domestic lienholders, and a mortgage executed and recorded under the State statutes. It was, therefore, a different question from the one presented in this case, and in view of their late decision in the case of *The General Buell v. Long, supra*, there can be no doubt but that that court would arrive at the same conclusion I have done.

Let an order be entered, and distribution made according to the principles herein laid down.

ANTHONY v. AETNA INSURANCE CO.

Circuit Court, Sixth Circuit ; Eastern District of Michigan, June T., 1869.

INSURANCE.—WHAT ARE “PERILS OF THE SEAS.”

Under a policy of marine insurance against “perils of the lakes, seas, rivers, &c.”; also against “all other perils and misfortunes, &c.”; also against “the usual risk of lighterage at O.” the assured shipped cattle to O. At that port, as the vessel was prevented by a bar from landing, the cattle were put on board a lighter to be landed. They were tied by ropes to a chain running through the lighter, fore and aft. This was the usual mode of landing cattle at that port. While the lighter was proceeding in, the cattle became frightened, broke a part of the chain loose, rushed overboard and were drowned.

Held, 1. That this loss was within the insurance of “perils of the seas, &c.”

2. That even if it were not covered by that provision, it was embraced within the general assurance against “other perils and misfortunes,” and that against “the usual risk of lighterage at O.”

Motion for a new trial.

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This action was brought by Francis W. Anthony against the *Ætna Insurance Company*, to recover upon a policy of insurance issued by the defendants upon live stock shipped on board a propeller plying upon Lake Superior.

The facts out of which the controversy arose, are detailed in the opinion of the court. Upon the former trial, which took place before Judge WILKINS, the court directed the jury to render a verdict for the defendants, upon the ground that the loss which the plaintiff had sustained was not covered by the policy.* The plaintiff now moved for a new trial, contending that this ruling was erroneous.

Moore & Griffin, for the motion.

Pond & Brown, opposed.

WITHEY, J.—On May 1, 1865, an open, season policy was issued by defendants to plaintiff, insuring the plaintiff's property from ports and places to ports and places, including the voyage in which was this risk. The adventure was to begin from the loading, and continue until the property should "arrive and be safely landed at the port of destination." The risks covered by the policy are, "perils of the lakes, seas, rivers, canals, railroads, fires, jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment or damage of the said property, or any part thereof;" also, "the usual risk of lighterage at Ontonagon."

* This decision was reviewed by the *London Law Times* upon the erroneous view that the jury had found, upon the facts, that the case was not one within the terms of the policy; was not a loss by perils of the seas. In truth, Judge WILKINS, before whom the cause was tried, upon hearing the facts, which were stipulated in writing, *directed* the jury to render a verdict for the defendant. W.

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Under this insurance the plaintiff shipped on board the propeller Pewabic, from Bayfield to Ontonagon, on Lake Superior, forty or more beef cattle. The vessel arrived off the latter port in July, 1865, but was prevented by a bar in the harbor from landing. The animals were taken from the propeller on to a lighter to be landed, and were fastened upon the lighter in this way: A chain of five-eighth inch iron—called an anchor chain—ran fore and aft through the middle of the lighter, fastened at the ends to timber heads eight or ten feet from each end of the lighter. To this chain the cattle were tied by ropes, heads in, on opposite sides of the chain. When the lighter had proceeded from a quarter to a third of the distance in, the cattle, from some cause not explained, became frightened, breaking the chain into three pieces, and twenty-seven of the cattle, tied to one of these pieces, went over into the lake and were drowned by the weight of the chain carrying their heads under water. The lighter was tugged in and out, and was in good condition. The cattle were fastened on the lighter in the customary way of lightering at that place.

Such was the case made by the plaintiff at the trial, and the question presented, which we are called upon to decide, is whether the loss was occasioned by a "peril of the lakes," or "other peril and misfortune," within the meaning and intent of the policy.

The general doctrine is, that the insurer undertakes, in a marine risk, only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed. Every loss which arises from tempests, or by rocks, winds or waves, *strictly and naturally* comes under the idea of a loss occasioned by perils of the sea. But if this be the extent of the phrase, "perils of the sea," we should be obliged to conclude that it covered only accidents of an extraordinary nature, and produced

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only by *natural* causes peculiar to that element. Such, however, is clearly not the rule for construing the phrase, "perils of the sea," in reference to marine insurance.

Mr. PARSONS, in his work on Marine Insurance, vol. 1, page 544, says: "The phrase, 'perils of the seas' covers all losses or damage which arise from the extraordinary action of the wind and sea, and from inevitable accidents directly connected with navigation, excepting those provided for in other parts of the policy, as captures and the like."

Mr. Justice STORY, in the case of *The Reeside*, 2 *Sumn.* 567, 571, remarks, that "the phrase 'danger of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

The supreme court of the United States, in *Garrison v. Memphis Insurance Co.*, 19 *How.* 312, 314, seems to give the more extended sense to the term, "perils of the sea," as suggested by Judge STORY. That court says, these words "have been extended to comprehend losses arising from some irresistible force or overwhelming power, which no ordinary skill could anticipate or evade."

It has often been said, and correctly, that what are ordinary and what are extraordinary perils, is a question of much difficulty. The difficulty has been illustrated by many cases: Thus, in *Magnus v. Buttemer*, 9 *Eng. Law & Eq.* 461, a vessel moored in a tide harbor, and took ground when the tide fell. In consequence

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of this she was hogged and strained all over. It was held the underwriters were not liable. In *Potter v. Suffolk Insurance Co.*, 2 *Sumn.* 197, the circumstances were very similar to the last case, and Mr. Justice STORY held, "that, unless there was inherent weakness in the vessel, such damage could only be occasioned by an unusual and extraordinary accident in grounding, upon the ebbing of the tide, which would be a peril of the sea."

In *Hunter v. Potts*, 4 *Campb.* 203, Lord ELLENBOROUGH held that a leak occasioned by rats was not a peril of the sea, not being a loss of an extraordinary nature. But in *Garrigues v. Coxe*, 1 *Binn.* 592, a leak occasioned by rats was held to be a peril within the policy. And Mr. PARSONS, in his *Marine Insurance*, volume 1, page 546, note, after citing a number of cases, concludes his review by saying: "On the authority of the recent cases in this country, we should consider the insurers liable in such a case, even if the rats remained on board through the negligence of the master, on the ground that the damage by water was the proximate cause of the loss." We might refer to many other cases on the subject, but we think they will not tend very much to elucidate the question involved in the case at bar; inasmuch as every case depends so much on its own particular facts and circumstances.

My own views are strongly in the direction of holding this case to be a loss within the term "perils of the sea," in accordance with the more comprehensive sense of those words and their more reasonable signification—in brief, because the cattle were drowned, which is peculiar to the element on which they were being transported; because they were drowned by an accident that could not have been guarded against by ordinary exertions or prudence, considering the fact that it was the usual mode of lightering at that place, which fact must be presumed to have been known to the insurer;

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because, too, it could not reasonably have been foreseen that there was inherent weakness in the chain ; and because, in the absence of explanation by the insurer, it is to be presumed the fright of the animals was caused by something connected with navigation, whether from the exhaust of steam, the working of machinery of the tug, the ringing of a bell, or otherwise. It was a peril of navigation, which could not well have been foreseen or guarded against by the carrier.

But we are not compelled to rest our decision on the ground strictly of a loss by a "peril of the sea," and the court does not wish to be understood as so deciding. I have simply indicated the tendency of my own mind after an examination of the question, because that particular point was much dwelt upon by the arguments of the learned counsel.

We are entirely clear, after a careful examination of the authorities, that the loss was a risk within the general terms of the policy, "all other perils and misfortunes," and the specific provision, "the usual risk of lighterage at Ontonagon."

While it is laid down by the authorities, that these general words, "all other perils," cover only perils of the *like kind* to those specifically enumerated, we think they are material and operative words, and are not in the policy to have no effect assigned to them in its construction. HILDYARD on Marine Insurance, page 348, says, these words have "the effect of providing for any doubts which might arise as to cases which come nearly, but not precisely, under the specific causes of loss. In *Cullen v. Butler*, 5 *Maule & Sel.* 465, Lord ELLENBOROUGH says: 'They are entitled to be considered as material and operative words, and to have due effect assigned to them in the construction of this instrument ; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like

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kind with those which are specially enumerated and occasioned by similar causes.'”

The animals did not die from disease or any inherent defect in them, but from an accident on water, in course of the voyage, and was something peculiar to that element. Had the accident of breaking the fastening occurred in a land transportation, no such result could have taken place. The cattle were drowned by their heads being drawn under water by the weight of the piece of chain to which they were tied. It was five-eighths inch iron, and had the chain been perfect would undoubtedly have resisted any strain the whole number of the animals on board could have produced, and yet the accident was fortuitous.

It was the custom to use this chain for fastening cattle lightered from vessels; it was believed to be sufficiently strong, and, as we have already remarked, it could not have been foreseen, in all reasonable probability, that there was inherent weakness in this anchor chain. The insurer must be presumed to have known the usual mode and appliances of lighterage at the place, and to have had it in contemplation when taking the risk.

If, now, we regard it doubtful whether the loss was strictly within the indemnity against “perils of the sea,” still we think it should be regarded as caused by perils of *like kind*, and therefore covered by the general words of the policy. No case has been found where the facts were like those in the one at bar; but on principle, *Devaux v. PAnson*, 7 *Scott*, 507, is regarded as sustaining the conclusions to which we have arrived. In that case, the effect of the general words of the policy, “all other perils and misfortunes,” were very fully considered, and the cases which had been decided referred to. The declaration averred that the “ship was broken, damaged and destroyed, and rendered wholly incapable of pursuing the said voyage,

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by certain perils which the said assurers as aforesaid by the said policy did take upon themselves, to wit: by the accidental breaking and giving way of the tackle and supports whereby the said ship was supported, in being moved from a certain dock; in consequence of which breaking and giving way, the said ship struck violently against the sand and was bilged, broken, destroyed, damaged, and rendered incapable of pursuing the said voyage as aforesaid." The defendants traversed the allegation that the ship was "broken, damaged, and destroyed, and rendered incapable of pursuing the said voyage, by *any perils which the said assurers, by said policy, did take upon themselves.*" Lord Chief Justice TINDAL said, "the point remaining to be considered is, whether the loss was occasioned by any of the perils insured against by the policy. It is to be observed that the words in the policy are very large; the policy not only enumerates 'perils of the sea,' but 'all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage' of the subject matter of the insurance." After referring to several cases, the learned judge says, "the loss occasioned by the endeavor to get the vessel afloat from the dock in which she had just been repaired, was a loss within the policy." Here the supports broke and caused the damage, like the case at bar.

Again, the other clause in the contract, "the usual risk of lighterage at Ontonagon," was clearly not necessary to indemnify the assured against "perils of the sea," nor perils of the like kind, for the risk begins with loading the freight, and continues *until safely landed*. Assuming, then, what is claimed by defendants, the accident which happened not to be a loss by "perils by the sea," nor "other perils and misfortunes," we should, in order to give due effect to the clause, "usual risk of lighterage," in view of the other stipulations of the policy being held not to cover the

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loss, say that it is covered by the risk of lighterage. In the view we have taken of "all other perils and misfortunes," there is no occasion to inquire into the effect of the lighterage clause; but if we were to hold differently in reference to the other specific and general clauses of the policy, it would be difficult to see how the lighterage clause could be regarded as operative words in the contract, unless held to cover their loss.

For the reasons given, the motion must prevail, and a new trial be awarded.

Order accordingly.

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*District Court; Western District of Pennsylvania,
May T., 1869.*

INTERNAL REVENUE.—TREASURY REGULATIONS.

A regulation of the treasury department, made in pursuance of an act of Congress, becomes a part of the law, and is of the same force as if incorporated in the body of the act itself.

Under the internal revenue laws of July 13, 1866, § 94, and March 3, 1865, § 61, when oil is transported from one district to another, under a transportation bond, the duty is assessed and paid on any *deficiency* or *reduction* of the *number* of gallons received at the warehouse, from the number of gallons as stated in the bond at the place of shipment, less the per centum for leakage allowed by the treasury department. And this is so, although there has been an absolute loss by solar heat, or the action of the elements.

The law has provided a rule regulating the allowance for leakage, from which, however great the hardship, it is not the province of the courts to depart.

Trial by the court.

MCCANDLESS, J.—This is a case stated upon an oil transportation bond. On June 30, 1866, the defendants shipped by railroad from the twentieth district of Pennsylvania to the fifth district of New Jersey, ten hundred and eighty barrels, containing forty-five thousand three hundred and twenty-four gallons of refined oil, in good packages, and under legal permits and certificates from the proper authorities. Under like authority the oil was removed from the fifth district of New Jersey to the bonded warehouse of Reynolds, Pratt & Co., in the second district of New York, without inspection and gauging in the New Jersey district, with the same effect as if the second district of New York had been the destination set forth in the permit and bond under which such transportation was made.

The oil was properly gauged and inspected in the bonded warehouse of Reynolds, Pratt & Co., on July 30, 1866. By this inspection there was found to be a loss of six thousand two hundred and sixty-four gallons. For the tax of twenty cents per gallon upon this quantity so lost, this action is instituted; the tax upon the residue of the forty-five thousand three hundred and twenty-four gallons having been properly settled and accounted for. The effect of continued extremely hot weather upon oil barrels, exposed for the length of time ordinarily required in transit from the twentieth district of Pennsylvania to the second district of New York, is to decompose their lining and open their seams. From the last of June to the close of July, 1866, the weather continued excessively hot. The loss of so much of the six thousand two hundred and sixty-four gallons as exceeds the quantity allowed for leakage, by the regulations of the department at Washington, arose from the effect of solar heat upon the barrels containing it.

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The amount of actual leakage on oil removed in bond at the time of this loss, allowed by the regulations in pursuance of section 61 of the act of June 30, 1864, was not to exceed three and one-half per cent. on any distance exceeding five hundred miles. The distance from the twentieth district of Pennsylvania to the second district of New York is in excess of five hundred miles.

It is not disputed that an allowance of one thousand five hundred and eighty-six gallons, or three and one-half per cent. on forty-five thousand three hundred and twenty-four gallons, should be made for leakage; but it is claimed that there should be a deduction for the remaining four thousand six hundred and seventy-eight gallons, because the loss was occasioned by the effect of solar heat upon the article transported.

This is the question for our decision, and I have given to it all the consideration which the multiplicity of my judicial engagements and the demands upon my time would permit.

Congress wisely encouraged the exportation of oil, for it has become an important element in regulating the balance of trade between the United States and foreign nations. Oil exported was exempt from taxation. If for sale or consumption in the United States it was subject to a tax of twenty cents per gallon, to be assessed and collected, and paid by the producer or manufacturer thereof, as is provided by section 61 of the act of July 13, 1866. By this section, as amended by the act of March 3, 1865, the oil may be removed, without the payment of the duty, under such rules and regulations, and upon the execution of such transportation bonds, or other security, as the secretary of the treasury may prescribe. Upon such removal, it must be transferred to a bonded warehouse, where it is again inspected and gauged, and "the duty shall be assessed and paid on any *deficiency or reduction of the number of proof gallons*

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(beyond such allowance for leakage as may be established by the regulations of the commissioner of internal revenue), received at the warehouses from the number of proof gallons as stated in the bond given at the place of shipment." Here, then, is a plain rule of computation, and the per centum of deduction being fixed by a regulation of the department, in conformity to an act of Congress, becomes a part of the law, and of as binding force as if incorporated in the body of the act itself.

It is contended by defendants' counsel, in an argument of much ability, that the tax is upon the consumption. It is not upon the consumption, but upon the manufactured article. The government is not to ascertain whether it has been consumed, but whether it has been exported. If so, it is free. If not, it is subject to the tax of twenty cents per gallon. Fixing a maximum per centage for leakage was designed to prevent the possibility of frauds, by the withdrawal or abstraction of any portion of the oil during its period of transit. Such being the rule prescribed by competent authority, courts have no right to depart from it, even in case of absolute loss by the action of the elements. The government is not an insurer. The owner insures, and must take the responsibility. The simple inquiry is, has he complied with the condition of his bond? Has he produced to the collector of the twentieth district of the State of Pennsylvania a certificate showing that such merchandise has been duly placed in the warehouse designated, from which it cannot be removed except for exportation, or upon payment of the tax, or has he paid the duties required by law?

It is wholly unnecessary to enter into a discussion as to the effect of solar heat upon refined oil, or as to the penetrating and permeating qualities of the liquid itself. It was precisely because of the operation of this agency that a rule was necessary to fix the allowance. In some cases there would be no leakage at all; in some, less

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than three and a half per cent. ; in a majority of cases, about three and a half per cent., and in some cases much more. On what principle is a rule of law governing this subject to be relaxed and set aside, because there was extraordinary warm weather in June or July of a particular year? As was ably argued by the counsel for the government, the leakage in this case happened in the ordinary way, was produced by the ordinary causes, with the difference, that one cause, solar heat, was operating with more than ordinary power. The result was leakage, and the law, and the regulations of the department, do not authorize a distribution of leakage into *ordinary* and *extraordinary* as respects an abatement of taxes. The law calls the loss thus produced leakage, and has provided a rule regulating the allowance, from which, however great the hardship, it is not our province to depart. Any other construction would not only open a wide door to fraud, but would practically nullify the regulation itself.

It follows that the defendants have no lawful claim to, or deduction for, the four thousand six hundred and seventy-eight gallons, by reason of its loss, caused by solar heat, and judgment must be rendered for the United States, for the sum of nine hundred and thirty-five dollars and sixty cents, with costs of suit.

Judgment accordingly.

Martinetti v. Maguire.

MARTINETTI v. MAGUIRE.

*Circuit Court, Ninth Circuit ; District of California,
February T., 1867.*

DRAMATIC COPYRIGHT.—IMMORAL SPECTACLES.

Where the exhibitor of a dramatic composition made no sufficient proof of title thereto by authorship or purchase from an author, and the facts indicated that his play was a colorable imitation of the performance which he sought to restrain, his application for a provisional injunction was refused.

The act of August 18, 1856, 11 *Stat. at L.* 138,—declaring that any copyright granted to the author or proprietor of any dramatic composition designed or suited for public representation, shall be deemed to confer the sole right of representation,—does not extend so far as to protect mere spectacles or arrangements of scenic effects, having no literary character. An exhibition, spectacle or scene, is not a “dramatic composition.”

Nor does the act above mentioned extend so far as to protect a composition of an immoral or indecent character. Such composition should not be deemed “suited for public representation” within the meaning of the act.*

It seems, that Congress have not power to pass a law conferring the privilege of copyright upon immoral or indecent works or compositions. The power to pass copyright and patent laws, embraces such only as tend to “promote the progress of science and useful arts.”

* In the act of July 8, 1870,—by which the former copyright laws are repeated (as respects future compositions), and a new system of provisions is enacted in their place,—the restrictive words of the act of 1856, “designed or suited for public representation,” are not found. The act provides (section 86) that any citizen, &c. who shall be the author, inventor, designer or proprietor . . . of any book, map, chart, *dramatic* or musical composition . . . shall, upon complying with the provisions of this act, have the sole liberty of printing . . . and vending the same ; and in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others.”

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Cross motions for temporary injunctions.

Julien Martinetti (and others) filed a bill against Thomas Maguire (and others), seeking to restrain them from performing a play named the "Black Crook ;" which the plaintiffs alleged was an infringement of their copyright in a play named the "Black Rook." Martinetti, in turn, filed a bill against Maguire, claiming copyright property in the "Black Crook ;" and alleging that the "Black Rook" was a colorable imitation thereof, and an infringement, and praying that it be enjoined.

Motions were made, by the plaintiffs in each suit, for temporary injunctions ; and these motions were heard together.

DEADY, J.—The plaintiff in each of the above entitled suits moves the court for an order allowing an injunction until the hearing. By consent the motions were heard together, upon the bills and oral testimony of the parties.

The plaintiff, Martinetti, charges that on October 17, 1866, at New York, one James Schonberg composed and copyrighted a dramatic composition called "The Black Rook," and that said Schonberg at the same time assigned such play exclusively to the plaintiff. That said plaintiff is the proprietor of the Metropolitan Theater in San Francisco, and is about to produce on the stage said play of the Black Rook. That the defendant, Maguire, by improper means, procured a manuscript copy of the Black Rook from an employee of the plaintiffs, and is exhibiting the same at the theatre of the defendant, Maguire's Opera House, in San Francisco, to the injury of the plaintiff. That the defendant, before making such exhibition, changed the name of the play to the Black Crook, and also changed the

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names of the characters, and made some slight alterations in the dialogue and incidents of the play.

The plaintiff, Maguire, charges that about July 1, 1866, one Charles M. Barras, at New York, composed a dramatic composition called the Black Crook, and copyrighted the same. That said play was exhibited at Niblo's Theater, in New York, for the benefit of the author, early in September, 1866, and continuously since that date, with great gain to the author. That about March 25, 1867, the plaintiff became the exclusive assignee of the right to exhibit the Black Crook in the State of California, and in pursuance of such right and assignment is now exhibiting the same at his theater in San Francisco—Maguire's Opera House. That during the exhibition of the Black Crook, at Niblo's, as aforesaid, the defendant procured a copy of the same, by employing one Schonberg, or other person, to attend such exhibition and take down the parts in short-hand, as they were spoken and acted by the players, and that the defendant is now about to exhibit such play from the copy so obtained, at his theater in San Francisco, under the name of the Black Rook, to the damage of the plaintiff.

A number of witnesses have been examined as to the identity of the plays. So far as I can judge from the testimony, the plays are identical. One of them must be a mere colorable imitation of the other. The strong similarity in the names—Black Crook and Black Rook—is enough of itself to suggest that the one is an imitation of the other. All the disinterested witnesses who have been present at the exhibition of the Black Crook at Niblo's and Maguire's agree in stating that they thought the plays the same. It is admitted and charged by Martinetti, that the play now on exhibition is substantially the play which he calls the Black Rook and claims to be the proprietor of. For the purpose of the comparison, we may assume that the Black Rook is

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being played at Maguire's and the Black Crook at Niblo's. Whatever technical differences there may be in the exhibition at these two places, if the result is so nearly similar as to produce the impression of identity upon ordinary spectators, it seems to me that one ought to be held a mere colorable imitation of the other. A play like this has no value except as it is appreciated by the public. If the similarity in general character and effect between the alleged imitation and the original is sufficient to deceive the ordinary public who witness such exhibitions, the one is a piracy of the other. Which is the original and which is the imitation? The dates of their respective compositions seem to furnish a satisfactory answer to this question. The Black Crook was composed and copyrighted in the early part of July, 1866, while the Black Rook was not composed until the middle of the October following, and after the former had been exhibited to the public at Niblo's for at least six weeks. Unless both are originals—unless this strong similarity is a mere coincidence, and not the result of design, I must conclude that the Black Crook is the original and the Black Rook the imitation or copy. As neither of these spectacles, in their essentials, have much claim to originality, I suppose that the coincidence is possible. But it is not probable, and all the other circumstances tend to establish but one conclusion—that the manuscript of the so-called Black Rook, procured by Martinetti in New York from Schonberg, was a mere colorable imitation or copy of the Black Crook, obtained by improper means. Whether Martinetti knew this at the time or since is immaterial. In any event he has only the rights in the premises which Schonberg would have, if the latter were the party litigant. Under the circumstances, the reasonable presumption is, that Martinetti did not purchase the Black Rook as an original composition, but rather that he employed Schonberg or some

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other to procure a copy of the *Black Crook*. No evidence is produced of the alleged purchase of the *Black Rook*, except the allegation to that effect in the bill. If Martinetti had purchased an original composition, or what he believed to be an original composition, called the *Black Rook*, which had been copyrighted by the author, he would naturally have taken an assignment to himself, and been able to produce it in evidence or account for its absence. This omission tends strongly to negative the allegation of purchase by Martinetti.

It is admitted that Maguire has the right to exhibit the *Black Crook* in California, and also that the present exhibition is being made, not from the copy obtained from the author at the time of the assignment by him to Maguire, but from a copy of the manuscript which Martinetti alleges he obtained from Schonberg. Maguire's copy is now on the way here from New York.

If Martinetti's copy had been obtained by legitimate means, it being prior in point of time to the assignment of Maguire, he would have a right to make the exhibition from that copy, as against the author or his assigns. In such case, Martinetti's copy would be his literary property, and the purchase of a copy of this manuscript, by improper means, would be a fraud upon him. The purchase of the copy from McCabe, by Maguire's manager, was made under such circumstances, and would not give Maguire any right as against the lawful proprietor. At the time of the sale by McCabe of the copy, he declined to tell when or how he got it. Maguire's manager then knew that the Martinettis were rehearsing the spectacle set down in the manuscript, and he had good reason to believe that he was purchasing stolen property, and whether he believed so or not, as such was the fact, the effect is the same—supposing that Martinetti had the literary property in the manuscript which he obtained in New York. By literary

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property, I mean, of course, the composition and not the paper. But the Black Rook or manuscript of the Martinettis was itself a plagiarism of or a copy from the Black Crook. This being the case, it was stolen property in the same sense that the copy procured by Maguire's manager was. Then Martinetti has no literary property in his manuscript. He is neither the author, assignee, or donee. For this reason he cannot enjoin Maguire from the use of the copy obtained by him, however obtained. More than this, I suppose that the owner or assignee of a play, who finds that a colorable imitation of it or a true copy surreptitiously obtained, is in the hands of a third person, may, as a matter of precaution or economy, purchase the same, as the cheapest and easiest way to protect his rights, even if he should know at the time that the person of whom he makes the purchase obtained it from another improperly. In effect, he is only buying his own property—buying his peace—instead of going to law.

This, I believe, disposes of all three grounds on which Martinetti relies for an injunction, and his motion therefore must be denied, with costs.

On the other hand, if this is a dramatic composition within the purpose and meaning of the act of Congress, Maguire's motion to enjoin Martinetti should be allowed. As at present advised, I do not think it such a composition. All the witnesses agree—particularly the experts—that the play has no originality, and that it consists almost wholly of mere scenic effects taken from well known dramas and operas. The testimony of W. B. Hamilton, the stage manager of the Metropolitan, is explicit and satisfactory upon this point. He has been an actor since 1828, in Europe and America. He appears to be intelligent in his profession, and impressed me with his candor. The Black Crook is a mere spectacle—in the language of the craft, a spectac-

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ular piece. It has no pretensions to be called a dramatic composition. The dialogue is very scant, and appears in the light of a mere accessory—a piece of word machinery tacked on to the ballet and tableaux.

The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or undress, or in striking attitudes or action. The closing scene is called Paradise, and consists, as witness Hamilton expresses it, “of women lying about loose”—a sort of Mohammedan paradise, I take it, with imitation grottos and earthly houris.

To call such a spectacle a “dramatic composition” is an abuse of language. An exhibition of *model artistes*, or a menagerie of wild beasts, might as well be called a dramatic composition, and claim to be entitled to copyright. A menagerie is an interesting spectacle, and so may this be, but it is nothing more. An exhibition of women, whether in the ballet or tableaux, or even “lying round loose” in such a paradise, is not a dramatic composition and entitled to the benefit and protection of copyright.

Again, the act of Congress enacts that a “dramatic composition,” to be entitled to copyright, must be “suited for public representation.” What is intended by the word “suited”? Simply that the composition is adapted to the stage, and capable of being produced upon it? While it means this, I am inclined to think that it means something more; that to be suited to public representation, it must be fit to be represented. I do not suppose or pretend that Congress has the power to interfere directly and prescribe a rule of morals on this subject; but the benefit of copyright is a benefit conferred by Congressional legislation. In conferring this privilege upon authors and inventors, I suppose it proper and constitutional for Congress so to legislate as to encourage virtue and discourage immorality. The

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power to pass copyright and patent laws is derived from the constitution.

The constitution expressly asserts the object for which the power is granted. It is "to promote the progress of science and useful arts." *Const.* art. I. § VIII. subd. 9. From this it expressly appears that the constitution did not intend that Congress should pass laws to promote immorality, or any thing except *science and the useful arts*. For this reason, an instrument or invention expressly designed to facilitate the commission of crime, as murder, burglary, forgery, or counterfeiting, however ingenious, would not be entitled to be patented. So a real dramatic composition, if grossly indecent and calculated to corrupt the morals of the people, would not be entitled to a copyright. Such an exhibition neither "promotes the progress of science or the useful arts," but the contrary. The constitution does not authorize the protection of such productions, and Congress cannot be presumed to have intended to have gone beyond their power to give them such protection. In this view of the matter I very much doubt whether the spectacle of the Black Crook is entitled to the benefit of copyright, even if it could pretend to be a dramatic composition.

This court does not pretend to be the conservator of the public morals in this respect. That is a matter for the local legislatures. But in giving construction to the constitution and laws, when legitimately called upon to do so, it is the duty of all courts to uphold public virtue and discourage every thing that tends to impair it. It cannot be denied that this spectacle of the Black Crook merely panders to a prurient curiosity by very questionable exhibitions of the female person. The lawfulness of such an exhibition depends upon the laws of the place where it is exhibited. But when the author or proprietor of the spectacle asks the power of this court to protect him in the exclusive right to make

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such an exhibition, under the copyright law of Congress, the matter assumes a very different aspect. I am strongly impressed with the conviction that an injunction should not be allowed in this case, on the ground that the spectacle is not "suited for public representation"—not *fit* to be exhibited—within the meaning of that word as used in the act of Congress, and on the further ground that it is not within the scope of the power of Congress to encourage the production of such exhibitions, as they neither promote the progress of *science* or the *useful* arts.

Maguire's motion for an injunction must, therefore, also be denied, with costs.

Motions denied.

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*District Court; Western District of Pennsylvania,
January T., 1869.*

INTERNAL REVENUE LAWS.—REPEAL OF STATUTE.

The provisions of section 2 of the act of March 31, 1868, which repeal sections 94 and 95 of the internal revenue law of June 30, 1864, and acts amendatory thereof, do not operate to preserve prosecutions commenced but not carried to judgment before the repeal took effect.

Where the statute declaring an offense and its punishment is repealed, without a provision saving pending prosecutions, an indictment previously found, but not yet tried, should be quashed on motion. There is no longer an offense; and no one can be punished for what is not an offense at the time of punishment.

Motion to quash an indictment.

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This was an indictment against John B. Finlay, for rendering false returns of manufactures of woolen goods. The facts of the case are sufficiently stated in the opinion.

Mr. Golden, Mr. Marshall, and Mr. Kerr, for the motion.

Mr. Baily, Mr. Carnahan, District-Attorney, and *Mr. Boggs*, opposed.

MCCANDLESS, J.—As both the government and the defendant are ready to proceed to trial, the brief space which has intervened since the argument has not afforded me time to elaborate an opinion upon the points submitted by the learned counsel for the defendant. It will be sufficient to state a few of the reasons for the conclusions at which I have arrived.

The defendant is indicted for making false returns of woolen manufactures, with intent to evade and defeat the assessment of taxes imposed by the internal revenue law. The taxes on woolen goods were assessed by virtue of section 94 of the act of March 2, 1867, which was amendatory of the act of June 30, 1864. By section 82 of this act of 1864, as amended, these returns were required to be made to the assessor of the district, and were required to be upon oath. By section 15, any person who shall deliver to the assessor any false or fraudulent return, shall, upon conviction, be subject to fine or imprisonment, or both, at the discretion of the court; and by section 42, any person swearing falsely in any matter, where an oath is required under this act, shall be deemed guilty of perjury, and be subject to the pains and penalties provided by the laws of the United States for such crime.

It is charged that from the month of June, 1868, to the month of March, 1868, inclusive, the defendant

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delivered, *as true*, false and fraudulent statements of the woolen goods sold and removed for consumption and use, which were manufactured by him, and upon which taxes were imposed by law.

It is now moved to quash this bill, upon the ground that the act of Congress upon which the defendant is indicted has been repealed by the act of March 31, 1868, exempting certain manufactures from internal revenue tax, and for other purposes. In considering this question, we are not driven to the necessity of inquiring whether this is a repeal by implication, or whether there is such a repugnance between the two acts that the former must give way to the latter. The repeal is in express terms, and without a saving clause as to offenses committed in violation of the repealed statute. Section 2 simply reserves the right to collect, under the old system, any tax which might accrue between the date of the passage of the act and April 1, 1868.

Revenue bills are reported and discussed many months before their enactment into laws, and as by section 4 the first quarterly assessment under the new system was to be made in the month of July following, for the three months preceding, Congress anticipated that there might be a hiatus or interval between the passage of the bill and April 1, to which neither law would apply, and therefore provided for it in this section. But there was no hiatus, for the act passed the day before, on March 31. This is the only provision in the act of 1868 that savors of a saving clause, and it is limited to taxes which may thus accrue. It can have no application here, for all those taxes had accrued before the passage of the bill.

What, then, are the provisions of the act of 1868? It declares that sections 94 and 95 of the acts of June 30, 1864, and all acts and parts of acts amendatory of said sections, be, and the same are hereby repealed. Section 4, in lieu of the tax of two and a half per cent.

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ad valorem, imposes a tax of two dollars per thousand on sales in excess of five thousand dollars, which shall be assessed and paid quarter-yearly, as other taxes are assessed and paid. This act is then a repeal and abolition of the tax and system of taxation upon woolen manufactures, which existed at the period when it is alleged this offense was committed. It is a repeal of the law under which the defendant is indicted. The crime and its penalty are abrogated. Where, then, is our jurisdiction? How can we try the defendant, and, if found guilty, punish him under a law that has no existence? The offense is gone, and no one can be punished for what is not a crime at the time of punishment. Nothing is more certain than that if a statute creating an offense be repealed, all proceedings under it fall. 4 *Dall.* 373. The government alone is interested in the prosecution of criminal cases; it can terminate them at any stage by a *nolle prosequi*; it can obliterate the offense from the penal code; and provided it leaves the citizen his civil remedy for the injury that is peculiar to himself, it violates no right of property, and it offends no principle of justice. The law unquestionably is, that after the repealing act is passed there shall be no such offense as that for which this defendant is indicted. It is no longer an offense; it cannot be indicted, it cannot be punished, it is taken from the penal code absolutely.

This was substantially the argument for the defense in *Duane's Case*, in 1 *Binney*, 601, sustained by the chief justice, afterwards by the supreme court of Pennsylvania, in 1 *Wheat.* 460, and by Mr. Justice WASHINGTON, who, in 1 *Wash. C. Ct.* 89, says: "It is a clear rule, that if a statute create an offense, and is then repealed, no prosecution can be instituted for any offense committed against the statute previous to its repeal."

Such being the law, the present prosecution must fail. And suppose, as is certainly the case, that these

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internal revenue laws are not without obscurity, in the language of Chief Justice TILGHMAN, I feel myself on the safest and strongest ground, in adopting a construction which takes away the punishment.

Indictment quashed.

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*Circuit Court, Eighth Circuit; District of Nebraska,
May T., 1870.*

REMOVAL OF CAUSES.—SEVERAL DEFENDANTS.

A non-resident plaintiff, who has brought an action at law in a State court against a citizen of the State in which the suit is brought and a citizen of another State, the latter of whom voluntarily appears, may, by complying with the act of Congress of March 2, 1867, 14 Stat. at L. 558, obtain a removal of the cause, as to all the defendants, to the proper circuit court of the United States.

The various acts of Congress relating to the removal of causes from the State to the Federal courts, discussed, and their construction and operation explained by DILLON, Circuit Judge.

Motion to remand a cause to a State court.

The plaintiff in this action, William G. Sands, was a citizen of the State of New York. Two of the defendants, Charles B. and Julia Smith, were citizens of the State of Nebraska; the third, Lydia A. Salisbury, was a citizen of Missouri. The plaintiff, in April, 1868, brought an action against the above named defendants, in one of the State courts of Nebraska. In 1869, and

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before final hearing or trial, *the plaintiff* filed his petition in due form, in the State court, for the removal of the cause to the circuit court of the United States for the district of Nebraska. He also filed in the State court an affidavit, pursuant to the act of March 2, 1867, 14 *Stat. at L.* 558, stating therein that he had reason to believe and did believe, that from prejudice or local influence he would not be able to obtain justice in the State court, and offered the requisite surety for his entering copies, &c. in the United States court. Subsequently, on this application coming on to be heard, the State court made an order transferring the cause to the circuit court of the United States.

The defendants now moved to remand the cause to the State court, for the reason that, under the circumstances above stated, the order for the removal was erroneously made.

It appeared that the amount in dispute exceeded five hundred dollars and costs. The action was founded upon a joint and several promissory note signed by the defendants, Smith and wife, and by Lydia A. Salisbury and her deceased husband. The Smiths pleaded usury and payment—this payment being alleged to have been made by the receipt by the plaintiff of rents and profits of certain premises mortgaged to secure the note.

Mrs. Salisbury pleaded, in the mode authorized by the State practice, by way of counter-claim, or in the nature of a cross action, an equitable defense ; and prayed for affirmative relief. She alleged, in substance, that she and Mrs. Smith borrowed the money of the plaintiff for which the note in suit was given, mortgaging a tract which each owned in severalty, and also a tract which they owned in common ; that the plaintiff had obtained in the State courts a decree of foreclosure for accrued interest on the note in suit ; that this decree was void for want of jurisdiction as to Mrs. Salisbury ; that the plaintiff bought in the property

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under the decree, and has since been in possession, receiving the rents and profits, alleged to be more than sufficient to pay the mortgage debt. She prayed that an account might be taken of the amount due the plaintiff on the note, and of the rents and profits received, and that she might be allowed to redeem the premises from the mortgage, if any thing is due thereon.

J. M. Woolworth, for the motion.

Redick & Briggs, opposed.

DILLON, J., delivered the opinion of the court. By the constitution, the judicial power of the United States extends "to controversies between citizens of different States."

In prescribing the jurisdiction of the circuit courts of the United States, the judiciary act did not confer it as broadly as it might have done under the constitutional provision just quoted, but limited it to cases where the "suit is between a citizen of the State where the suit is brought and a citizen of another State." Act of September 24, 1789, § 11. Under this provision, one of the parties, either the plaintiff or defendant, it matters not which, must be a resident of the State where the suit is brought, and the other not. In other words, it must be a controversy or suit between a resident and a non-resident citizen. The next section of the judiciary act (§ 12) provides for the removal of causes, under certain circumstances, from the State courts to those of the United States. Until very recently this was the only statute authorizing the removal on the ground of citizenship of the parties. It authorized the removal by the defendant (under the limitations therein mentioned) where the suit is commenced in the State court "by a citizen of the State in which the suit is brought against a citizen of another State." That is, if the suit is by a

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resident plaintiff, *the non-resident defendant* may have it removed ; but the resident plaintiff could not. Under section 11 of the judiciary act, a *non-resident plaintiff* might sue in the circuit court a *resident defendant* ; but if a non-resident plaintiff elected to sue in a State court, section 12 of that act would give *neither* party the right to remove the cause from the State court to the United States court. The plaintiff was not given the right because he had voluntarily selected the State court in which to bring his action ; the defendant was not given the right because it was not supposed that he would have any grounds to object that he was sued in the courts of his own State. So that the right of removal by the judiciary act is limited to the non-resident defendant when sued by a resident plaintiff in the courts of the State.

By section 11 of the judiciary act, as we have seen, the circuit court has jurisdiction when the suit is between a citizen of the State in which it is brought and a citizen of another State.

This was construed by the courts to mean that if there were several plaintiffs and several defendants, *each* one of each class must possess the requisite character as to citizenship. *Strawbridge v. Curtiss*, 3 *Cranch*, 267.

For example, a citizen of New York and a citizen of Georgia could not join as plaintiffs in suing in New York a citizen of Massachusetts (if found in New York) because the plaintiffs were not each competent to sue, for the citizen of Georgia could not (under section 11 of the judiciary act) sue a citizen of Massachusetts in New York. *Moffat v. Soley*, 2 *Paine*, 103.

But other and greater difficulties were experienced. Section 11 of the judiciary act also enacted "that no civil suit should be brought in any other district than the one whereof the defendant was an inhabitant, or in which he shall be found at the time of serving the writ."

By the common law, all parties jointly liable must

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be jointly sued and brought into court, and if any of them reside out of the district where the suit was brought, or in the State in which the plaintiff resided, the national court was deprived of jurisdiction.

To remedy this, the act of February 28, 1839, 5 *Stat. at L.* 321, was passed. This statute will be referred to more at large hereafter. In my opinion, it gives a citizen of one State the right to commence suit in the circuit court of the United States in any other State against such persons as reside there, or may be found there, and the jurisdiction of that court is not defeated by the circumstance that other persons (proper but no longer necessary defendants) reside in some other State.

Under section 12 of the judiciary act above quoted, regulating removals, it was held that a cause could not be removed unless all the defendants asked for it; that to bring the case within the act, *all* the plaintiffs must be citizens of the State in which suit is brought, and *all* the defendants must be citizens of some other State or States. *Beardsley v. Torny*, 4 *Wash. C. Ct.* 286; *Ward v. Arrendondo*, 1 *Paine*, 410; *Hubbard v. Railroad Co.*, 3 *Blatchf.* 84; S. C., 25 *Vt.* 715.

But the rule did not apply to persons who were mere nominal or formal parties. *Brown v. Strode*, 5 *Cranch*, 303; *Wormley v. Wormley*, 8 *Wheat.* 421; *Ward v. Arrendondo*, *supra*; *Wood v. Davis*, 18 *How.* 467.

It will be borne in mind that the act of February 28, 1839, above mentioned, authorized suits against defendants who might be non-residents of the district in which suit is brought, or not found therein, and that the plaintiff might proceed to judgment against those served, and against such non-resident defendants as should voluntarily appear.

Under this act a citizen of New York may, as in the case at bar, sue a citizen of Nebraska in the United States circuit court sitting in the latter State, and may also make a citizen of Missouri a party defendant; and

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if the latter is served within the district of Nebraska, or voluntarily appears to the action, the suit may proceed to trial and judgment against all. So that it is not true, as urged by the defendants, that this suit could not originally have been brought in the circuit court of the United States for the district of Nebraska ; and hence, by allowing its removal, the court does not get cognizance of a cause which could not in the first instance have been brought therein.

But if this were so, it would not *necessarily* follow that the right of removal did not exist ; for the circuit court may by *removal* acquire jurisdiction of a cause which could not have been *commenced* therein. Sayles v. Northwestern Ins. Co., 2 *Curt.* 212 ; Bliven v. N. E. Screw Co., 3 *Blatchf.* 111 ; Barney v. Globe Bank, *Id.* 107 ; S. C., 2 *Am. Law Reg. N. S.* 221.

Such being the law and the construction of the courts, Congress passed the act of July 27, 1866, 14 *Stat. at L.* 306, entitled "An act for the removal of causes in certain cases from the State courts."

This act provides for removal in cases where the citizenship of the defendants is different. It contemplates cases where the *plaintiff* in the State court is "a citizen of the State in which the suit is brought," following in this respect the language of section 12 of the judiciary act. But it enlarges the provisions of the judiciary act in that it contemplates the case of several defendants, some residing in the State in which the suit is brought, and some in a State other than that in which suit is instituted ; and it authorizes, in certain cases, the *non-resident defendant* to have the cause removed *as to him* and to proceed in the State court as to the resident defendants. The effect of this statute is plain :—without it no removal could be made, because *all* the defendants were not within the act, and under the ruling of the courts before mentioned, unless the cause was removable as to all, it was not removable as to any.

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But, as in the judiciary act, the right of removal is confined by the act of July 27, 1866, to cases where the plaintiff is a resident and the defendant is a non-resident, and it is limited to the *foreign defendant*, and does not extend to the plaintiff.

We now come, in the progress of this discussion, to the act of March 2, 1867, 14 *Stat. at L.* 558, upon which the right of removal in the case at bar is claimed, and which is the first act which, in any event, extended the right to plaintiffs. It professes to be an amendment to the act of July 27, 1866, last noticed, and it extends the right, in the cases provided for, as well to *plaintiffs* as defendants, but confines it to such as are *non-residents* of the State in which the suit is brought, and makes the ground of removal not alone the citizenship of the parties, but prejudice or local influence.

The act provides "that where a suit is now pending, or may hereafter be brought in any State court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State . . . such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit, stating that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in such State court," he may have the cause removed to the circuit court of the United States.

It will be seen that as to the plaintiffs, this follows the language of section 11 of the judiciary act, and not of section 12 of that act ; the plaintiff may or may not be a resident of the State where the suit is brought ; and the right of removal is given to the non-resident party, be he the plaintiff or defendant.

Speaking of this act, Mr. Justice MILLER, in a case in this court, *Johnson v. Monell*, May term, 1869, *Miller's Decisions* by WOOLWORTH, page — , says : "The

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only conditions necessary to the exercise of the right of removal are :

1. That the controversy shall be between a citizen of the State in which the suit is brought, and a citizen of another State.

2. That the matter in dispute shall exceed the sum of five hundred dollars, exclusive of costs.

3. That the party citizen of such other State shall file the required affidavit, stating, &c. the local prejudice.

4. Giving the requisite surety for appearing in the Federal court. Congress intended to give the right in every case where the four requisites we have mentioned exist."

In that case the plaintiff was a citizen of Iowa, one defendant was a citizen of Nebraska, and the other of New York, but the last was not served with process and did not appear ; and it was held that the plaintiff was entitled, under the act of March 2, 1867, to have the cause transferred from the State court to the United States court after a verdict of the jury in the State court in his favor had been set aside by the court.

Taking the act of March 2, 1867, in connection with the acts of February 28, 1839, and July 27, 1866, we are of opinion that it was the intention of Congress to give (in the enumerated conditions) a non-resident plaintiff the right to remove the cause from the State court, where the adverse parties are citizens of the State where the suit is brought ; and this right is not defeated by the circumstance that some one of the persons, made a defendant under the act of 1839, may be a citizen of a State other than that in which the suit is brought. This seems to the court to be the spirit and manifest purpose of the legislature in question. It is the supposed local influence and prejudice that form the basis of right of removal in favor of the non-resident. As against the Smiths, if sole defendants, it is conceded

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that the right would exist. As respects the defendant, Salisbury, we have seen that suit might have been brought against her and the Smiths in the circuit court:—she is deprived of no right by holding in favor of the removal, and it seems to us to be an extremely technical construction to hold that the right of removal depends upon the circumstance that all the defendants are residents of the State in which the suit is brought.

The act of March 2, 1867, construed in the light of previous legislation and decisions, in its terms covers this case; and if so, this court has jurisdiction over it. This is put very plainly by an eminent judge in speaking of a cause removed under section 12 of the judiciary act: "But the jurisdiction (of the United States circuit court, over this case does not depend upon section 11, but on section 12 of the judiciary act. If it be a suit which that section authorizes the defendant to remove, it empowers this court to take jurisdiction over it when removed." Per CURTIS, J., *Sayles v. Northwestern Ins. Co.*, 2 *Curt. C. Ct.* 2, 12.

The view on which the motion to remand is based is that maintained in the early case of *Strawbridge v. Curtiss*, 3 *Cranch*, 267, and overlooks the modifications which subsequent legislation and decisions have made. See *Louisville Railroad Co. v. Letson*, 2 *How.* 497, 556; *Heriot v. Davis*, 2 *Woodb. & M.* 229; *Taylor v. Cook*, 2 *McLean*, 516; *Doremas v. Bennett*, 4 *Id.* 224.

It is to be remembered that the plaintiff's action is upon a joint and several promissory note, and that he seeks simply to recover an ordinary personal judgment upon it against the makers. The case is one in which the plaintiff might ordinarily have sued in this court, making the Smiths and Mrs. Salisbury defendants. It is precisely such a case as the act of 1839 contemplated.

Mrs. Salisbury voluntarily appeared in the State court, and answered to the action. The circumstance

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that she pleads as a defense (under the State practice) matters which properly constitute grounds for a bill in equity cannot defeat the right of removal, if the right otherwise exists; and that it does exist, we have above endeavored to show. The motion to remand is denied; but as in this court law and equity must be kept separate, it is suggested that it may be advisable for the parties to reform the pleadings so as to adapt them to the practice in this tribunal.

DUNDY, J., concurred.

Motion denied.

UNITED STATES v. SA-COO-DA-COT.

*Circuit Court, Eighth Circuit; District of Nebraska,
May T., 1870.*

INDIANS. — CRIMINAL JURISDICTION OF NATIONAL
COURTS.

Indians, though belonging to a tribe which maintains the tribal organization, but occupying a Reservation *within* the limits of a State, if there is no valid statute of Congress or treaty to the contrary, are amenable to State laws for murder or other offenses against such laws committed by them off the Reservation and within the limits of the State.

Query,—whether the United States courts have jurisdiction, under such circumstances, of offenses committed by Indians *upon* the Reservation?

The court in a capital case against Indians, though neither party asked it, and both demanded judgment, arrested judgment, *on its own motion*, for want of jurisdiction over the offense charged in the indict-

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ment; but, instead of at once ordering the discharge of the Indians, the court made a special order for turning them over to the State authorities.

The relations which Indians, residing within State limits, sustain to the State and the United States, and their respective laws, discussed, by DILLON, Circuit Judge.

Motion for judgment upon a verdict.

The defendants, four in number, and Indians, were indicted for the murder of Edward McMurty, a white inhabitant of the State of Nebraska. They were tried before District Judge DUNDY and a jury; upon a plea of not guilty. The jury found a verdict of guilty.

No question or objection was raised on behalf of the defendants, touching the jurisdiction of the court, until after verdict. Two motions were then made, one for a new trial, and one in arrest of judgment; by the latter of which the question of jurisdiction was for the *first time* presented. These motions were argued and submitted; but before any decision upon them was had, they were by leave of the court withdrawn.

Motion was now made on behalf of the government for judgment upon the verdict.

Mr. Strickland, District-Attorney, and *Mr. Baldwin*, for the motion.

No argument was made in opposition.

DILLON, J., delivered the opinion of the court.—The present attitude of this case is not a little singular. The one party asks, and the other party, acting under the advice of skillful counsel, does not resist a judgment which is the highest human laws or a human tribunal can inflict. It is the court alone which hesitates and deliberates.

In explanation of the course which the counsel for

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the defendants have taken in withdrawing all questions as to the jurisdiction of the court, a reason has been given, which, for the honor of the people of the State, it is hoped can have no real foundation, viz: That such is the strength of the tide of local feeling and prejudice against them and their nation, that they prefer to take a sentence of death and trust to Executive interposition, than to run the risk of illegal violence, if discharged from this court, or turned over to the authorities of the State. The court gladly avails itself of this occasion to express its conviction that fears of this character are groundless.

As the defendants have been duly indicted and convicted, it is the duty of the court to pass judgment against them, if it has jurisdiction of the crime charged in the indictment. Whether it has jurisdiction is the only question remaining to be decided. Notwithstanding the withdrawal of the motion in arrest, it is still the duty of the court, before pronouncing the sentence of death, to be satisfied that it has cognizance of the offense which it is proceeding to punish. No act that a court can be called on to perform is more grave and solemn than to render a capital judgment. To the performance of such a duty, a judge is only reconciled by the consideration that it is not he who does it, but the LAW, of which he is simply the minister. But if the law invests him in the particular case with no such power, he may well deliberate, and must refuse to exercise it.

If the court has no jurisdiction, therefore, it is its duty, on its own motion, to stay judgment, although this question may not be made, or may be waived by counsel.

With these preliminary considerations, which seemed proper to be stated, we proceed to examine the question whether the courts of the United States have jurisdiction of the offense for which the defendants have been convicted.

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The only allegations in the indictment made with a view to show the jurisdiction of the court are the following : "That the defendants are Indians belonging to the Pawnee tribe, which tribe are, and were, in charge of a United States Indian agent duly appointed by the United States, and were, and are, living upon an Indian reservation, known as the Pawnee reservation, within the State of Nebraska ; that said defendants crossed the boundary line of said Indian reservation and entered into the county of Polk, in the State of Nebraska aforesaid, and then and there unlawfully," &c. &c., did kill and murder by shooting, as particularly described in the indictment, one Edward McMurty, a white inhabitant of the said State.

Thus, it appears from the express averments of the indictment, that the place where the offense was committed was within the body of the county of Polk, in the State of Nebraska, and not within the limits of the Indian reservation. The proof, in this respect, corresponds with the allegations.

The offense is alleged, and was shown to have been committed on May 8, 1869, which was after Nebraska had been admitted into the Union, and her organization as a State was fully perfected and in operation. The question is, whether the offense thus committed is one of which the courts of the United States have cognizance, or whether it is alone cognizable by the courts of the State of Nebraska.

Within the territorial limits of the state just named is a body of people known as the Pawnee tribe of Indians, to which the defendants belong. This region has for many years been their home ; but their occupancy is now restricted to a "reservation" of limited extent. Here they reside in a body, maintaining their tribal organization, under the superintendency of agents appointed by the government of the United States. They are already in the midst of a white population,

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but do not enjoy any of the political, nor many of the civil rights of the latter. They do not vote, are not taxed, and under the decision of the supreme court of the United States their property is not taxable by the State authorities. The ordinary State laws relating to taxation, schools, marriage, divorce, administration of estates, and the like, are not extended to, observed by, or enforced among them. As respects all their internal concerns, they are governed and regulated by the laws and customs of the tribe.

The inquiry is neither uninteresting nor unimportant, as to which, whether the general government or the State, has legislative control over this people ; and if both, whether the power is concurrent, and if not, where is the boundary line, marking where the control of the one ends, and where that of the other begins. This inquiry it is our duty to answer, so far as the record in this case requires it. It is necessary to examine into the acts of Congress, relating to offenses committed by Indians, into the treaty stipulations of the United States with the Pawnees, and into the acts of Congress respecting the powers and jurisdictions of the State of Nebraska.

Nebraska was organized into a territory by the act of May 30, 1854, and by that act (§§ 4, 37) the rights of Indians therein are preserved unimpaired, and the authority of the United States to make regulations respecting them, their property and other rights, by treaty, law, or otherwise, retained. The Pawnee tribe then, as now, resided within the limits of the territory thus created.

On September 24, 1857, the Pawnees ceded by treaty of that date their lands in the Territory of Nebraska to the United States, reserving, however, "out of this cession a tract of country thirty miles long from east to west, and fifteen miles wide from north to south."

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11 *Stat. at L.* 729. This is the reservation described in this indictment.

The treaty provides that United States agents may reside on the reservation ; that the government may build forts thereon ; that the whites may open roads through it, but shall not reside thereon ; that the Indians shall not alienate the lands, except to the United States ; that all the offenders against the laws of the United States shall be delivered up, &c. ; but it contains no *stipulation* as to the *jurisdiction* over it, or over *the Indians* residing thereon, when the Territory shall be admitted as a State. On April 19, 1864, Congress passed an act to enable the people of Nebraska to form a State constitution ; in 1866 a State constitution was formed, and in 1867 Congress passed an act for the admission of Nebraska, under its constitution, into the Union, "upon an equal footing with the original States, in all respects whatsoever."

There is no exception in the State constitution, or in either of these acts of Congress, of the Pawnee reservation or the Pawnee Indians, from the territorial or civil jurisdiction of the State.

So that we have before us the case of Indians maintaining the tribal organization, which is recognized in the treaty by the general government, but living upon a reservation which is *now within* the limits of the State, and respecting which, or the Indians occupying it, there are no special provisions granting or retaining jurisdiction in favor of the United States, or withdrawing the Indians from the jurisdiction of the State.

It will be observed that the present indictment is not for an offense committed by Indians against an inhabitant of the State upon the reservation, and hence we have no occasion to inquire whether for such offenses the courts of the United States or those of the State of Nebraska have jurisdiction ; nor whether it would be competent for Congress in such a case (the

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absence of any cession of jurisdiction by the State) to invest the national courts with cognizance thereof.

See, on this point, *United States v. Bailey*, 1 *McLean*, 234, and the case therein referred to against two Indians for the murder of Davis in the Cherokee country, within the limits of a State; *United States v. Cisna*, *Id.* 254; *United States v. Ward*, opinion of Mr. Justice MILLER, *McCahon (Kansas)*, 119; S. C., *Woolw.* —; *United States v. Stohl*, opinion of MILLER, J., *McCahon (Kansas)*, 206; S. C., *Woolw.* —; *United States v. Rogers*, 4 *How.* 567; *United States v. Holliday*, 3 *Wall.* 407. Compare *Kansas Indians*, 5 *Id.* 737, and remarks of DAVIS, J., *arguendo*, p. 755; *New York Indians*, *Id.* 761; *Worcester v. Georgia*, 6 *Pet.* 616; *New York v. Dibble*, 21 *How.* 366.

As to *State* authority over Indians, see, also, *Goodell v. Jackson*, 21 *Johns.* 693, and constitutional provisions and act of April 12, 1822, 2 *Rev. Stat.* 881, there cited; *Murray v. Wooden*, 17 *Wend.* 531; *Swan's Ohio Stat.* 304; *Rev. Stat. Mass.* 148; *Clay v. State*, 4 *Kansas*, 49; *People v. Antonio*, 27 *Cal.* 484; *Hicks v. Euhartollah*, 21 *Ark.* 106; *Id.* 485; *Peters' Case*, 2 *Johns. Cas.* 344.

It will appear from these authorities and citations that New York, Ohio, and other States have, at different times, passed acts declaring that the civil and criminal jurisdiction of these States extended to Indians and to Indian reservations; and that such legislation has been considered valid when not in conflict with some treaty or constitutional act of Congress.

The *locality or place* where the homicide now in question is alleged to have been committed, is confessedly within the territorial limits of the State, and the deceased was an inhabitant of, or found within the State. It is settled that there are no common law offenses cognizable by the courts of the United States; that before these courts can take cognizance of an of-

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fense, it must be declared such by an act of Congress ; and that it is not competent for Congress, to enact a criminal code punishing offenses generally, but those only which relate to the general government, or which are committed by or upon citizens or inhabitants of the United States, upon the high seas, or within the national domain beyond the limits of any State, or in places over which Congress has exclusive jurisdiction. The offense charged in the indictment is murder ; and we now inquire whether there is any act of Congress which confers, or undertakes to confer jurisdiction upon the national courts of a homicide committed under the circumstances of the one under consideration ?

There are two statutes relating to murder, cognizable by the United States courts—the statute of 1790, and that of 1825. The former act provides that if any person shall “within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States,” commit the crime of willful murder, &c., he shall be punished, &c.

The latter act declares “That if any person upon the high seas or any river, &c., within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State,” shall commit willful murder, &c., he shall suffer death. It is scarcely necessary to remark that the case at bar falls within none of the provisions of either of these statutes. These do not undertake to punish murder generally, but only when committed on water out of the jurisdiction of any State, or upon land when committed at a place within the exclusive jurisdiction of the United States.

If other provisions do not exist, it is evident that the court had no cognizance of the case made in the indictment.

We have been referred to the Intercourse Act of

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1802, 2 *Stat. at L.* 137, 143, §§ 14, 15, by which Congress defined the "Indian country," and provided for the punishment by the United States courts of Indians who left the Indian country, and committed offenses in any State or Territory. It must have escaped the attention of counsel, that this act, so far as it relates to Indian tribes west of the Mississippi, was repealed as long ago as June 30, 1834. 4 *Stat. at L.* 729, § 29. As it will not be maintained that a prosecution can be supported under a repealed statute, we need give it no further attention.

The jurisdiction of the court is also sought to be sustained under the act of June 30, 1834, just cited. By section 1 of that statute it is enacted, "That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, shall be taken and deemed to be the Indian country." By a subsequent section, this Indian country is annexed, part to the judicial district of Arkansas, and the rest to the judicial district of Missouri. Section 25 is in these words :

"So much of the laws of the United States as provide for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country : *Provided*, that the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

At the time this statute was enacted it applied to the locality where the offense in question was committed ; but it ceased to be operative within the limits of Nebraska the moment when the latter was admitted into the Union as a State, upon an equal footing with the original States. This is the precise point decided by Mr. Justice MILLER in *United States v. Ward*, *supra*, and it is quite unnecessary to enlarge upon it, or repeat the reasons by which the conclusion is supported. That

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was an indictment of a white man for the murder of a white man, committed on an Indian reservation, within the State of Kansas, and it was held that the national courts had no jurisdiction, and the opinion expressed that the State courts had.

In *United States v. Bailey*, 1 *McLean*, 235, a case is referred to in the Tennessee district, where, in 1816, two Indians were indicted in the United States circuit court for the murder of a white man, on a reservation, in the Cherokee country, *within the limits of the State*, and it was decided that the United States court had no jurisdiction; and this decision in the Tennessee case, was the occasion of the passage of the act of 1817, 3 *Stat. at L.* 383, which (after the decision of the *Bailey* case) was *repealed* (4 *Id.* 729, 734), whereby Congress provided for the punishment in the national courts of offenses committed by Indians or others, upon Indian lands, within State limits. This decision referred to would preclude this court from taking jurisdiction in the case at bar, had the homicide been committed by the defendants *within the limits of the reservation*; but, as before remarked, the court has no occasion to give any opinion on this point. But if it could not take cognizance of offenses committed upon the reservation, it surely cannot of those committed beyond its limits.

And it seems impossible to hold that this court has jurisdiction in this case without necessarily implying that the courts of the State have not; and if they have not, then we decide that the State of Nebraska has not the power to make her ordinary criminal statutes co-extensive with the State limits, and enforce them against all persons living or found therein. Such a power we are not prepared to deny to the State, in the absence of some conflicting treaty stipulation or valid act of Congress.

No statutes, other than those above noticed, have been referred to by counsel, as giving the court jurisdic-

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tion in the present case, and these we hold do not confer it. This conclusion is supported by many of the cases before cited, and is opposed to none of them. Of its correctness the court entertains no doubt. In view of the peculiar relations which the general government sustains to the Indian tribes, I think I ought to observe that I am not at present prepared to yield assent to the opinion which Mr. Justice McLEAN seems to have entertained in Bailey's case, that Congress had no power to pass the act of 1817 (3 *Stat. at L.* 383); that is, Congress could not, if it saw fit, make punishable in the national courts offenses committed by or against Indians upon reservations in State limits. And it might be worth the consideration of Congress whether some such legislation would not be expedient.

But if it be conceded that under the power of peace and war, to make treaties, and to regulate commerce with Indian tribes (*Worcester v. Georgia*, 6 *Pet.* 515), Congress could, in the absence of reserved right to do so, withdraw Indians living within the limits of a State entirely from State jurisdiction and the reach of its criminal laws and process for offenses against its citizens committed off a reservation, it would seem most improbable that such a power would ever be exercised. We have seen that, in point of fact, Congress has not undertaken to exercise it, and therefore this court, which can take cognizance only of offenses created by some act of Congress, has no jurisdiction of the crime charged in the indictment.

The defendants must be discharged.

Under the circumstances of the case, the defendants having been convicted and entitled to be discharged only for want of jurisdiction, and following the course pursued in a similar case, *United States v. Cisna*, 1 *McLean*, 254, we deem it our duty to enter the following special order:

Ordered, That the district-attorney of the United

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States notify, without delay, the governor of this State, or the proper district-attorney, of this order: That the marshal retain the custody of the defendants, and safely keep them for the space of twenty days, within which time he will deliver them over to any authorized officer of the State, producing a writ for their arrest. If no such writ is presented within the time limited, he will discharge them from custody, or if they desire it, place them in the charge of the United States Indian agent or superintendent for the tribe to which they belong.

DUNDY, J., concurred.

THE LIVE STOCK, &c. ASSOCIATION v. THE
CRESCENT CITY, &c. COMPANY.

*Circuit Court, Fifth Circuit; District of Louisiana,
April 7, 1870.*

MONOPOLIES.—EFFECT OF “CIVIL RIGHTS” ACT.—
ENJOINING STATE COURT.

Section 1 of the fourteenth amendment to the constitution applies to whites as well as colored people, as citizens of the United States; and is intended to protect them in their privileges and immunities as such, against the action, as well of their own State, as of other States in which they may happen to be.

These privileges and immunities do not consist merely in being placed on an equality with others; but embrace all the fundamental rights of a citizen of the United States as such.

One of these fundamental rights is the right to pursue any lawful employment in a lawful manner; or, in other words, the right to

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choose one's own pursuit, subject only to constitutional regulations and restrictions.

An exclusive privilege, granted to a few individuals, incorporated into a body politic, and to their successors, for twenty-five years, to have cattle landings, stock yards, and slaughter houses for several miles in extent in and around the city of New Orleans ; with a prohibition to all other persons from having any such establishments in said district, is a restriction which violates the fundamental rights of other citizens willing to conform to all police regulations adopted for the public comfort and safety : and a legislative act granting such an exclusive privilege is a violation of the fourteenth amendment and void.

Such a law cannot be sustained under the right of the legislature to pass license laws and police regulations, and to grant exclusive rights for the exercise of public franchises.

It allows certain privileged persons to pursue an ordinary employment, and prohibits others from so doing ; and thus goes to establish one of those monopolies which are contrary to the spirit of a free government.

If, however, the State courts sustain such a law, and attempt to enforce it, the circuit court cannot issue an injunction to stay proceedings, being prohibited by the act of 1793, and Congress having passed no law to carry the fourteenth amendment into full effect. The remedy is to carry the suit to the highest State court, and then bring a writ of error to the supreme court of the United States.

By the civil rights bill, however, which, as far as it goes, covers the same grounds as the fourteenth amendment, the circuit court may take cognizance of a case like the present, and grant an injunction ; except as to staying proceedings already commenced in a State court.

Motion for an injunction, upon bill and answer.

The bill in this cause was filed by the Live Stock Dealers & Butchers' Association, and others, complainants, against the Crescent City Live Stock Landing & Slaughter House Company, and the Board of Metropolitan Police of New Orleans, as defendants. The general object of the bill was to restrain the defendants from taking proceedings to suppress the business of the complainants, in slaughtering animals and selling meat. The defendants claimed the right to

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prosecute such proceedings, under a statute of Louisiana conferring the exclusive right to prosecute such business in New Orleans upon the Crescent City Company.

The motion was argued before Mr. Justice BRADLEY and Judge Woods. The particular facts appear in the opinion.

J. A. Campbell, for the motion.

W. H. Hunt and *C. Roselius*, opposed.

BRADLEY, J., delivered the opinion of the court.—The complainants, who are engaged in the live stock landing and slaughter house business, pray for an injunction against the defendants, commanding them to suspend all proceedings against the complainants under and by virtue of an act of the legislature of Louisiana of March 8, 1869, giving to the corporation, defendants, the exclusive right to erect and have live stock landings and slaughter houses in and about New Orleans, which act the complainants allege to be in violation of the civil rights bill, passed April 9, 1866, and the first section of the fourteenth amendment to the Constitution of the United States ; also, that the complainants may be protected in their rights to perform whatever may be lawful and proper in their behalf for any citizen of the State to do, including the defendants ; and their right to slaughter, land, keep, maintain, and sell animals for food, and, when prepared for market, to sell and dispose of their meat, subject to no condition more severe than that of any other party, including the defendants ; and that they be maintained in their rights to construct all suitable buildings, structures for landing, keeping, and preserving animals for sale or use that are allowed to any other citizen of the State, including the defendants.

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The application brings up the question whether the civil rights bill applies to such a case as the present, and whether the fourteenth amendment to the Constitution is intended to secure to the citizens of the United States of all classes merely equal rights ; or whether it is intended to secure to them any absolute rights ? And, if the latter, whether the rights claimed by the complainants in this bill are among the number of such absolute rights ?

[After intimating an opinion (subsequently modified) that the civil rights bill did not apply to the case, the judge proceeds:]

The law in question, under which the acts complained of were committed, is one of a remarkable character. It was passed March 8, 1869, and is entitled "An Act to protect the health of the city of New Orleans, to locate stock landings and slaughter houses, and to incorporate the 'Crescent City Live Stock Landing & Slaughter House Company.'" It enacts that after June 1, 1869, it shall not be lawful to land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock landing, yards, pens, slaughter houses, or *abattoirs*, at any point or place within the city of New Orleans or the parishes of Orleans, Jefferson, and St. Bernard, or at any point or place on the east bank of the Mississippi river within the corporate limits of New Orleans, or at any point on the west bank of the Mississippi above the present depot of the New Orleans, Opelousas, & Great Western Railroad Company, except that the Crescent City Live Stock Landing and Slaughter House Company may establish themselves at any point or place as hereinafter provided. A penalty of two hundred and fifty dollars is imposed for every violation of this section. Thus far, the act, barring the exception at the close, is a mere police regulation, and, no doubt, a very proper one. The territory named extends some

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eight or ten miles on each side the river Mississippi, and includes the entire city of New Orleans and a large extent of surrounding country.

The next section incorporates William D. Sanger and others, seventeen persons in all, and their successors, into a body politic and corporate, to be called "The Crescent City Live Stock Landing & Slaughter House Company."

The third section enacts that said corporation may establish and erect, at its own expense, at any point or place on the east bank of the Mississippi river, within the parish of St. Bernard, or the corporate limits of the city of New Orleans, below the United States barracks, or at any point or place on the west bank of the river, below the present depot of the Opelousas Railroad, wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals; *and that said company shall have the sole and exclusive privilege of conducting and carrying on the live stock landing and slaughter house business within the limits and privileges granted by the provisions of this act.* The section then enacts that all cattle and other animals destined for sale or slaughter in New Orleans or its environs, shall be landed and kept at these landings and yards, for which the company are to be paid certain fees named in the act; and, in default of payment, are to have the privilege of selling the cattle therefor; and every violation of these privileges by landing or yarding elsewhere, is to be subject to a penalty of two hundred and fifty dollars. The section goes on to require the company, by June 1, 1869, to build a grand slaughter house of sufficient capacity to accommodate all butchers, and in which to slaughter five hundred animals per day; also sheds, stables, &c., to accommodate all the stock received at this port, under penalty of forfeiting their charter.

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The fourth section authorizes the company to erect landing places for live stock at any points or places consistent with the act, and to have the exclusive privilege of having landed thereon all animals intended for sale or slaughter in the parishes of Orleans and Jefferson ; and to erect one or more slaughter houses at any points or places consistent with the act, and to have the exclusive privilege of having slaughtered therein all animals the meat of which is destined for sale in the parishes of Orleans and Jefferson.

Section 5 directs the closing of all other stock landings and slaughter houses, after the completion of the company's, in the parishes of Orleans, Jefferson, and St. Bernard, and forbids any slaughtering therein under a penalty of one hundred dollars for every offense, and enacts that all animals to be slaughtered in the parishes of Orleans and Jefferson must be slaughtered in the slaughter houses erected by the company, and the company, on refusal to permit the same, will be subject to fine.

Section 6 provides for an inspector of cattle, to be appointed by the governor, to inspect all cattle to be slaughtered.

Section 7 fixes the fees to be paid to the company for slaughtering in their houses,—namely, one dollar apiece for all beeves, &c., besides the head, feet, gore, and entrails.

Section 9 authorizes the company to lay railroads from their buildings to the city, and to establish ferries across the Mississippi river.

Section 10 limits the charter to twenty-five years.

These are the provisions of the law. The complainants allege that they have been injured by its operation, and by the acts and proceedings of the defendants under it.

They state in their bill that for a long time past they have been engaged in the lawful prosecution of the live

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stock landing and slaughter house business, and in procuring, preparing, dressing, and vending of animal food for the markets of New Orleans and the parishes of Jefferson and Saint Bernard, and the steamers and other vessels engaged in the commerce of the same ; and that more than a thousand persons were connected with the trade aforesaid, and that the corporation complainant was formed to prosecute the trade and to provide suitable houses and conveniences therefor, and that the said corporation and its members, to the number of two hundred and fifty persons, and others in their employ, to the number of two hundred persons, have been hitherto engaged in the said trade and business. They complain that their rights are invaded by the act in question ; that the Crescent City Company have brought several hundred suits against them or some of them, have obtained injunctions, and in other ways vexed and harassed the complainants under color of the said act ; that the decision and judgments of the State supreme court have been adverse to the complainants ; and that although the said decision and judgments have been removed to the supreme court of the United States by writs of error, in such manner that said writs operated as a *supersedeas*, yet that the defendants have disregarded the same, and have applied to the eighth district court of the parish of Orleans, and have obtained a writ, which they call an injunction, directed to the Metropolitan Police Board, without making the complainants or any of them parties to the proceeding, by which writ said Metropolitan Police Board were commanded and enjoined to prevent all persons from landing, keeping, or slaughtering any cattle, beeves, calves, sheep, swine, or other animals, and from keeping or establishing any stock landings, yards, pens, slaughter houses, or abattoirs, at any point or place within the city of New Orleans, or the parishes of Orleans, Jefferson, and Saint Bernard, and to prevent any and all per-

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sons from selling or offering for sale in the city of New Orleans any animal for human food, not slaughtered and inspected at the slaughter house of said company ; and that the said Metropolitan Police Board did thereupon seize and possess themselves of meat, to the value of twenty thousand dollars, which was in carts and vehicles on their way to the markets, and have kept the same open and exposed until it has spoiled. The bill contains other allegations showing that the complainants are exposed to a multiplicity of suits, to vexatious litigation, and to irreparable mischief and damage by the unjust acts and proceedings of the defendants, the Crescent City Company.

To this bill the defendants have filed an answer in the nature of a demurrer, objecting, first, to the jurisdiction of this court, because the parties all reside in Louisiana, and the circuit court of the United States cannot enjoin proceedings in a State court. Secondly, that the bills set up the same matters which are set forth in a petition filed by the complainants in the State court, and decided by the supreme court of Louisiana, and from which decision a writ of error has been granted to remove the same to the supreme court of the United States. Thirdly, because the statute referred to is constitutional and valid, containing only police regulations, in no manner conflicting with the constitution of the United States, or the amendments thereof.

Before proceeding to examine the technical points raised by the defendants, we will discuss the main question arising upon the act of the legislature and the fourteenth amendment.

The constitution of the United States, before the adoption of the recent amendments, contained several provisions for the protection of the people in the enjoyment of their civil rights, liberties, and privileges, some of which were binding upon the government of the United States, and others upon the several States. Of

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the former kind were those which declared that the privilege of the writ of *habeas corpus* should not be suspended, unless when in cases of rebellion and invasion the public safety should require it; that no bill of attainder or *ex post facto* law should be passed; that no capitation or other direct tax should be laid, unless in proportion to the census; that the trial of all crimes shall be by jury, and shall be held in the State where committed; that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court; that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted, &c.

Those binding on the States were, that no State should make any thing but gold or silver coin a tender for payment of debts; nor pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or lay any imposts or duties on imports or exports, except as provided in the constitution; and that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

The latter class of provisions could not be carried into effect by congressional legislation, and depended for their vindication upon the voluntary action of the State legislatures and such jurisdiction as the courts of the United States might have when a case arose in which one of these rights was violated.

Since the breaking out of the late war, several amendments to the constitution have been adopted, intended to protect the citizens from oppression by means of State legislation, and to confer upon Congress the power, by appropriate legislation, to carry the amendments into effect. Amongst these, the fourteenth amendment declares that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States, and of the State wherein

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they reside, and that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property, without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws.

The new prohibition that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" is not identical with the clause in the constitution which declared that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It embraces much more.

It is possible that those who framed the article were not themselves aware of the far reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment, as framed and expressed, does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional enactment, it is to be presumed that the American people, in giving it their *imprimatur*, understood what they were doing, and meant to decree what has in fact been decreed.

The "privileges and immunities" secured by the original constitution, were only such as each State gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens, and against the citizens of other States.

But the fourteenth amendment prohibits any State from *abridging the privileges or immunities of the citizens of the United States*, whether its own citizens or any others. It not merely requires equality of privileges ; but it demands that the privileges and immu-

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nities of all citizens shall be absolutely unabridged, unimpaired.

What, then, are the essential privileges which belong to a citizen of the United States, as such, and which a State cannot by its laws invade? It may be difficult to enumerate or define them. The supreme court, on one occasion, thought it unwise to do so. 18 How. 591. But so far as relates to the question in hand, we may safely say it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit—not injurious to the community—as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments; it is also his privilege to be protected in the possession and enjoyment of his property so long as such possession and enjoyment are not injurious to the community; and not to be deprived thereof without due process of law. It is also his privilege to have, with all other citizens, the equal protection of the laws. Indeed, the latter privileges are specified by the words of the amendment.

These privileges cannot be invaded without sapping the very foundations of republican government. A republican government is not merely a government of the people, but it is a *free* government. Without being free, it is republican only in name, and not republican in truth, and any government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions, or at least subject only to such restrictions as are reasonably within the power of government to impose,—is tyrannical and un-republican. And if to enforce arbitrary restrictions made for the benefit of a favored few, it takes away and destroys the citizen's property without trial or condemnation, it is guilty of violating all the funda-

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mental privileges to which I have referred, and one of the fundamental principles of free government.

There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.

This right is not inconsistent with any of those wholesome regulations which have been found to be beneficial and necessary in every State.

It is not inconsistent with the exclusive right to make, use, and vend to others, for a limited period, a new and useful invention which the grantee or patentee has produced from his own brains or ingenuity. Society only gives to him the temporary use of that which, without him, it would not have had the benefit of, and as a consideration of that benefit, and to encourage others to make like use of their powers.

It is not inconsistent with the exclusive right to use a franchise,—that is, a right to do what the legislature alone can authorize to be done, and which no private citizen has a right to do without such authority,—such as to build and operate a railroad, to make a canal or turnpike, to establish a ferry, and other such public rights which involve a charge upon the public, and, in most cases, an exercise of the right of eminent domain. These franchises may be conferred upon a limited number of persons, natural or corporate, with power, and even exclusive power, to exercise them in certain localities, on certain terms, and under certain restrictions. Society obtains a consideration for the grant of these franchises in the investment of large amounts of capital in public improvements, which are required for the development of the country and its resources. They are franchises which can only be exercised as they are conferred by public authority, and cannot be exercised and enjoyed by all. They are far different from those ordinary pursuits and employ-

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ments of mankind which all citizens may properly and lawfully follow as their inclination leads them, and as the laws of demand and supply will allow.

Again : this fundamental right of labor is not inconsistent with that large class of cases in which the laws require a license or a certificate of requisite qualifications for admission to a particular employment or profession. No doubt there are many such, as to which the interests of society require that due preparation should be made and due qualifications should be possessed, before a person shall be allowed to enter them. But then they are open to all alike. None are excluded from the race of honorable competition by which to enter those employments, or by which to attain their honors. There is no corporate and exclusive guild of privileged individuals to which they are confined, and beyond the sacred pale of which there is no hope of admittance or promotion.

Nor is it inconsistent with the granting of a limited number of municipal licenses to follow certain pursuits, such as vending of intoxicating drinks, selling of drugs, or even selling of meats and keeping a market therefor. Public policy may require that these pursuits should be regulated and supervised by the local authorities, in order to promote the public health, the public order and the general well being. But they are open to all proper applicants, and none are rejected except those who fail to exhibit the requisite qualifications and guarantees, or who, after proper selections are made, would increase the number beyond what the interests and good order of society would bear. In those cases, none are excluded for the purpose of sustaining a monopoly. But each application is, or at least is supposed to be, examined on its own merits.

All these systems of regulation are useful and entirely competent to the governing power ; and are not at all inconsistent with the great right of liberty of pur-

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suit, which is one of the fundamental privileges of an American citizen.

The next question is : Does the law complained of, and the proceedings under it, conflict with the enjoyment of this fundamental privilege of the complainants ; or is it only such a political and police regulation as it is competent for a State legislature to make ?

The legislature has an undoubted right to make all police regulations which they may deem necessary (not inconsistent with constitutional restrictions) for the preservation of the public health, good order, morals, and intelligence ; but they cannot, under the pretense of a police regulation, interfere with the fundamental privileges and immunities of American citizens. The question has its limits in both directions ; and whilst we are to be specially careful not to do any thing that may trench upon the vast and almost limitless field of legislation, where the will of the people is supposed to be most freely and powerfully expressed, it is nevertheless our duty, with a firm and unflinching hand, to prevent the invasion of any clear and undoubted individual rights of the citizen which are secured to him by the constitution.

So far as the act of the legislature of Louisiana is a police regulation, it is, of course, entirely within its power to enact it. It is claimed to be nothing more. But this pretense is too bald for a moment's consideration. It certainly does confer on the defendant corporation a monopoly of a very odious character. If it be not fairly and fully within the definition of a monopoly given in the great case of monopolies (11 *Coke*, 85), it is difficult to conceive of a case which would be within it. But it is not sufficient to show that it is a monopoly and void at common law, for the legislature may alter the common law, and may establish a monopoly, unless that monopoly be one which contravenes the fundamental rights of the citizen protected by the constitution.

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We have already seen that some monopolies are legal, if not politic. But is this such a one as will be endured in a free country, under a constitution which guarantees to the citizen his fundamental privileges and immunities? This is the precise question for us to decide. And we admit that the question is one of great delicacy and embarrassment. When the question was first presented, our impressions were decidedly against the claim put forward by the plaintiffs. But the more we have reflected on the subject, the more we are satisfied that the fourteenth amendment of the constitution was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character. And it seems to us that it would be difficult to conceive of a more flagrant case of violation of the fundamental rights of labor than the one before us.

It was very ably contended, on the part of the defendants, that the fourteenth amendment was intended only to secure to all citizens equal capacities before the law. That was at first our view of it. But it does not so read. The language is, "No State shall abridge the privileges or immunities of citizens of the United States." What are the privileges and immunities of citizens of the United States? Are they capacities merely? Are they not also rights?

In the case before us, the citizen has chosen a lawful and useful employment. He has been brought up to it, and educated in it. He has invested property in it. He is willing to comply with all police regulations, properly such, in the exercise of it. He will not offend in any particular the regulations which the legislative or the municipal authorities may adopt. He will observe times, seasons, places, localities. But all is not enough. He is required to land his cattle on a privileged person's landing; to keep them in that person's yard or pen; to slaughter them in that person's house, and to

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pay a burdensome toll for these restrictions. He may construct a landing, a yard, a slaughter house equally as good, within the prescribed limits of locality, and subject to all the necessary regulations ; but that will not do. He must go to the privileged person and use his premises, and pay for their use.

This is not because the privileged person is the inventor of such accommodations, nor because the use of them is a franchise lying only in the public grant, nor because the privileged person is qualified by superior education and license, nor because he has received a municipal license as a herdsman or a butcher, but because he has obtained the exclusive privilege granted by the act.

The *ipse dixit* of the legislature assigns a lawful and ordinary employment to one set of men, and denies and forbids it to another. The injustice perpetrated under acts of irresponsible legislation has become a crying evil in our country. And while it must generally be without redress, except through the action of the elective body or the local courts, yet in those instances where the Federal constitution has provided a remedy, we ought not to shrink from granting the appropriate relief. We do not give any weight to imputations upon the honesty or integrity of the legislature, the courts, or the executive of this State. We are not authorized to do so. We are bound to presume, and do presume, that they have severally acted in good faith, and with an honest purpose not to transcend the limits of their constitutional powers. They have their duties to perform ; we have ours. And whilst we feel it due to them to examine their acts with great caution and due respect, we nevertheless feel bound to exercise an independent judgment.

Unless this be done by all who have public duties to perform, there will be no certain foundation to stand upon.

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In the exercise of that judgment, we feel compelled to decide that the act in question is a violation of one of the fundamental privileges of the citizen, and that an injunction would have to be granted substantially as prayed for, but for one of the technical objections raised by the answer of the defendants.

The objection that the circuit court of the United States cannot enjoin proceedings in the State court, is an objection which cannot be surmounted.

The fourteenth amendment authorizes Congress, by appropriate legislation, to carry its provisions into effect. Congress, in the exercise of the power thus given, would undoubtedly have the right to authorize the Federal courts to take jurisdiction of cases of this sort, and to enjoin proceedings in the State courts, as well as proceedings in the Federal courts. But Congress has not as yet assumed that jurisdiction, and therefore the court are left to the provisions regulating the proceedings of the United States courts passed seventy or eighty years ago. Section 3 of the act of 1793 declares that no writ of injunction shall be granted to stay proceedings in any court of a State. This act has never been repealed. The court, therefore, feel compelled to *refuse* the injunction to restrain the defendants from proceeding with the legal remedy which they have instituted in the State courts.

The remedy of the parties is to allow the proceedings to pass to judgment, and if the highest court of the State should decree against the construction of the fourteenth amendment which is claimed by them, and which this court has assented to, then they can carry the case up by writ of error to the supreme court of the United States, and have the whole question reviewed.

At the opening of the court on Saturday morning, June 11, Justice BRADLEY made the following announcement:

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In the slaughter house case yesterday, we expressed the opinion that the civil rights bill did not apply to the case ; that it was intended merely to secure to all citizens, of every race and color, the same privileges as white citizens enjoy, and not to modify or enlarge the latter. This portion of the opinion was not written at the time, and was somewhat hastily expressed. Our attention had been chiefly given to the main question—the true construction of the fourteenth amendment. On a more careful examination, considering that the civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment ; was reported by the same committee ; was *in pari materia* ; and was probably intended to reach the same object, we are disposed to modify our opinion in this respect, and to hold, as the counsel on both sides seem to agree in holding, that the first section of the bill covers the same ground as the fourteenth amendment, at least so far as the matters involved in this case are concerned.

And while we still hold that the act is not intended to enlarge the privileges and immunities of white citizens, it must be construed as furnishing additional guarantees and remedies to secure their enjoyment ; and this is probably the reason why Congress has neglected to pass an additional law for carrying the fourteenth amendment into effect, the civil rights bill being regarded as having already supplied the necessary provisions for that purpose.* Still, this bill has not repealed the law which prohibits the Federal courts from issuing an injunction to stay proceedings at law in the State courts. The prayer for injunction will, therefore,

* An act for carrying into effect the fourteenth and fifteenth amendments was approved by the president on May 31 ; but had not obtained publicity at the time this decision was rendered. Section 18 of this act re-enacts the civil rights bill, and thus impliedly adopts it for the purpose of carrying the fourteenth amendment into effect.

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stand denied to that extent, but granted as to the residue, and the rule will be corrected accordingly.

In pursuance of this announcement, the following decree was made in the case :

This cause came on before the court upon a motion for a special injunction, and was argued by counsel for the plaintiffs and defendants, and thereupon it is declared by the court that the said plaintiffs are entitled to land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, and to have, keep, or establish any stock landing, yard, pens, slaughter houses, or abattoirs at any point or place on the east bank of the Mississippi river within the limits of the parish of Saint Bernard, or in the corporate limits of the city of New Orleans below the United States barracks, or at any point on the west bank below the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, to the same extent of right as the said Crescent City Live Stock Landing and Slaughter House Company have and enjoy, subject to inspection, and such other police regulations as the said company, and others engaged in like employment, are subject to ; and that the said parties (plaintiffs) may carry on the live stock landing and slaughter house business, and may prepare animal food for market, and may vend and dispose of the same, and may keep and maintain animals for sale, and erect wharves, sheds, stables, and yards, and do whatever it may be lawful for the said defendants to do under the terms of their act of incorporation as an exclusive privilege, subject to like regulations as aforesaid ; and the court directs that an injunction be issued from this court, enjoining and restraining the defendants from commencing or prosecuting any other suits upon their act of incorporation than such as are now pending against the said plaintiffs, or either of them, for doing or performing any

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act embraced in the declarative clause of this decree, or from suing for any fine or penalty imposed in said act of incorporation, or for doing or performing any of the acts aforesaid, and from interfering with them in the prosecution of their lawful occupations as live stock dealers, or butchers, or as vendors of animal food or animals.

And the said court here excepts from the operation of this decree, the proceedings in any of the courts of the State that are now pending, but reserves to the said plaintiffs all other remedies for their protection contained in the constitution of the United States and act of Congress, whereby in the lawful pursuits aforesaid, they may be deprived of the rights here declared and ascertained.

UNITED STATES v. TWELVE THOUSAND THREE
HUNDRED AND FORTY-SEVEN BAGS
OF SUGAR.

*District Court ; District of California, August T.,
1868.*

COLLECTION OF DUTIES.—BOND FOR RETURN OF GOODS
SEIZED.

Under section 89 of the duties collection act of 1799,—which allows goods seized for non-payment of duties to be appraised, and delivered to the owner upon his giving a bond for the payment of the appraised value, &c.,—the bond must be for the actual cash value of the property, at the time and place of seizure, without any deduction for duties paid. This rule applies equally, whether the property has been seized in warehouse or in the hands of the importer.

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Petition for return of goods seized as unlawfully imported.

The custom-house officers having seized a quantity of sugar upon an information that it had been imported without payment of full duties, this petition was now presented by the owner, under section 89 of the duties collection act of 1799, praying that, upon his executing the bond required by the section, and otherwise complying with its provisions, the property might be delivered to him. The only question made, was as to the amount of the bond.

Doyle & Barber and *C. A. McNulty*, for the petition.

Delos Lake, District-Attorney, for the United States.

HOFFMAN, J.—An application is made by the owner and claimant of the goods proceeded against in this suit, that the appraisers be instructed to appraise the goods at their cash market value less the duties legally chargeable upon them, and that upon giving bond for the value so ascertained, and producing a certificate of the collector that the duties have been paid, the goods be delivered to the claimant.

This application is opposed by the district-attorney, who contends that the goods should be appraised at their full market value, without deducting the amount of the duties.

It appears that two separate entries at the custom-house were made of the goods,—a part was entered for consumption, the usual deposit made to cover the duties, and a delivery order obtained by the importer. Before this order was executed the goods were seized. For the remainder of the goods a warehouse entry was made, and the bonds required by the acts of August 30,

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1842, and August 6, 1846, duly executed. They were still in the warehouse when seized.

The question presented to the court is important. It has been very fully discussed by the learned judge of the southern district of New York, who has delivered a long and elaborate opinion, in which the whole subject is reviewed.

The conclusions at which he arrives are, that the bond for value under section 89 of the act of 1799 should represent the full value of the property to the importer at the time of seizure.

That when the property is seized in his hands, after the duties are paid, its value to him is its market value, which necessarily includes the duties.

But that, where property under bonds for duties is seized in a warehouse, its full value to the importer at the time of seizure is its market value, less the duties; and for this amount the bond on delivery must be given.

I have been unable to assent to the correctness of these conclusions.

It is observed by the learned judge that "the interpretation uniformly given to section 89 of the act of 1799 is, that the sum at which the property seized is to be appraised is its value as of the time and place of seizure."

No authorities are cited in support of this position. With great deference it appears to me to involve a fundamental error.

The government on a seizure of forfeited goods acquires a right of property, which it enforces by a condemnation and sale. As until condemnation the fact of forfeiture is unascertained, the claimant is allowed to obtain his goods on submitting in their stead a bond for their value. The sum for which this bond is to be given should obviously be a sum equal to the value of the goods to the government at the time they are deliv-

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ered to the claimant, or the equivalent of the amount which might then be realized from them by a sale in the market. Nothing less will put the government in the same position as if it had retained the goods, or prevent its being a loser by the pretended substitution of an equivalent in value.

To estimate this value as of any other time than that of the appraisement and delivery might, according to circumstances, be a hardship and an injustice either to the government or to the claimant. The seizure may have been made months previously. If, in the mean time, the price of the goods has declined, or their value otherwise been impaired, it would be unjust to demand of the claimant a bond for a larger sum than he can obtain for them in the market. If, on the other hand, their price has appreciated, he has no right to ask the government to surrender goods which have become its property by the forfeiture without receiving a bond of an amount equal to their full value when it surrenders them. This value is evidently the price which the goods then command in the market.

When the claimant applies to the court for a delivery of the goods seized, on payment of the duties and giving a bond for their value, he, in effect, asks that the property be delivered to him, on which, as soon as it reaches his hands, the whole market value can be realized. This is its true value, both to him and to the government. If he be permitted to give a bond for a less amount, he will obtain his goods at less than their true value, and the government will part with them on a security representing a smaller sum than the goods would be worth if retained in its possession.

It is plain that in case of seizure, as in all other cases where property in the possession of the law is surrendered on substituting a bond for its value, the bond should be for a sum equivalent to the value of the goods at the time of the delivery by the party who surrenders,

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and to the party who receives. This is evidently a sum no greater and no less than the market value of the goods at the time of the delivery.

But even if it were true that the basis of appraisement is the value of the goods to the importer at the time and place of seizure, I do not perceive why that value is to be taken as the market value less the duties.

The importer has given bond for the duties, and this bond he is liable for, unless the goods be re-exported. If the goods perish in the warehouse, he still remains liable for the duties, and his loss is the amount of their market value. If he forfeits the goods in consequence of his crime he must still pay the duties, and the loss he sustains is the market value of his goods. This loss the government alleges he has incurred, and if, while the question is undetermined, he seeks to obtain his goods, he must give bond in the sum they were worth to him when his ownership of them was divested by the forfeiture and seizure.

Even then, on the hypothesis that the appraisement is to be as of the time and place of seizure, it is clear that the basis of appraisement must be the full market value of the goods at that time without deducting the duties.

But for the reasons assigned above, I think it evident that the value must be fixed as of the time the appraisement is made, and the goods delivered to the claimant.

But it is said, in the opinion referred to, that "in case such a bond as the government claims to receive in this present case be given, the importer will lose, if the property is condemned in the suit, not only what was the value to him of the property in warehouse at the time of its seizure, but in addition a sum equal to the amount of the duties chargeable thereon, and if, after thus bonding the property, he withdraw it for consumption, he must pay the duties on it in cash to the col-

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lector, notwithstanding the amount has been included in such delivery bond. *He will thus, in case of condemnation, lose more than he would if the property was not delivered to him on bond, but was to remain in the hands of the government and be sold by it.* In each case the same offense is charged, and has been committed, for which the property is forfeited. In each case the property is in warehouse under bond for duties. The merchant is equally guilty in each case; but if the claimant seeks to avail himself of the privilege of bonding his property when it is seized while in warehouse, he cannot do so according to the views urged by the government, without imposing upon himself a liability in case the property is condemned which he will not incur if he leaves the property in the hands of the government. Such a result is opposed to the spirit and intent of section 89 of the act of March 2, 1799. To require from him such a bond as the government claims, would be to deprive him practically of the benefit of bonding warehoused property seized and prosecuted while in warehouse. *But if the property is delivered to the claimant on a bond for its value when seized, not including the duties, then if the property is condemned in the suit the importer will lose the same amount as if he had not bonded the property, and no more, and will thus have the full benefit of the privileges of the warehouse system, and the full benefit of the system of bonding provided for by section 89 of the act of 1799."*

I have cited this passage at length, for it contains a full statement of the ground on which the learned judge based his opinion. The fallacy of the fundamental idea on which it rests appears to me evident.

The penalty attached by law to the offense charged is the forfeiture of the goods seized, or their value.

The payment of duties is not exacted as any part of the penalty. The obligation to pay them attaches abso-

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lutely as the consequence of the importation, and this payment is exacted, whether the goods be forfeited or not, as a condition precedent to the delivery of them to the importer. If the goods be entered for warehouse, the importer has the right, within a limited time, to re-export them and procure the cancelation of his bond; but in all cases where the goods are delivered to the importer, as the claimant now asks the court to order, the duties must first be paid.

If the goods are condemned the loss to him is precisely the same, whether he bonds them, as the government now claims he must do, or whether he suffers them to remain in the custody of the court and be sold under its decree.

In either case he must pay the duties, for his bond for duties can only be canceled by the exportation of the goods, and this, by his own crime, he has put it out of his power to do. Besides the duties, he loses, in either case, the value of his goods, and *no more*.

If he suffers them to be sold, this is evidently the amount of his loss. But if he obtains their delivery to himself on giving bond for their full market value, the bond will represent only what they are worth to him, and the sum he can obtain for them in the market. If the goods are subsequently condemned, he pays over their proceeds in satisfaction of his bond, and his liability is thus precisely what the statute creates—liability to pay the duties, and as a penalty for his offense, the loss of his goods or their proceeds.

The fallacy of the argument so often urged, that by exacting a bond for the full market value, including duties, and also requiring the duties to be paid, the court obliges the importer to pay duties twice, is also apparent.

He pays duties but once, and he gives bond for the amount which the property is worth to him when delivered, and which, if the appraisement be just, he

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realizes from its sale. If he be permitted to take his goods on giving bond for their market value, less the duties, the inevitable consequence will be that he will save, and the government will lose, a sum equal to the amount of the duties.

For though he pays duties in the first instance, he can sell the goods at their market price, and thus be reimbursed the duties he has paid, while the balance of the proceeds will be sufficient to satisfy the bond he has given. The goods will thus have gone into consumption in effect without payment of duties, or, to speak more accurately, the government will, though it has received the duties, recover less, by precisely their amount, than the value of the property, the ownership of which it had acquired by the forfeiture.

The circumstance that the goods have been seized in a warehouse can in no way affect the matter, for the claimant asks, not that the goods be permitted to remain in warehouse, and the seizure be superseded, but that they be delivered to him and go into consumption. This the court can order only on payment of duties.

He thus puts himself precisely in the position of one who withdraws goods for consumption, and the value he should give bond for is the value of the goods he receives, which is their market price, or the sum he can obtain for them.

Even if the importer, whose goods have been seized in a warehouse, can, on applying to bond them, be considered as retaining any right to avoid payment of duties by re-exporting them, a single illustration of the possible results of the mode of appraisement suggested will expose its erroneousness. Let us suppose the market value of the goods to be equal to or less than the amount of the duties.

Such is said to have been until recently the case with regard to whiskey.

Their market value, less the duties, will, in such

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case, be nothing, and the claimant can procure their delivery to him on giving bond in a nominal sum.

If, then, he can omit to pay the duty, and re-export the goods, or recover the duty back by way of drawback (as he may possibly do in this case under section 14 of the act of August 30, 1842), he may, by a sale in a foreign market, realize from them a sum which, though less than the duties, may be considerable, while the government, which has established its title, by forfeiture, to the goods, will have neither duties, goods, nor a bond.

In view of the late ruling market prices of whiskey, the case suggested does not seem an extreme one, but the case is illustrated in all cases where the amount of the duties bears any considerable proportion to the market value of the goods.

It is observed by the learned judge of the southern district of New York, that "uniformity of principle and equal justice to importers, in all cases, can be carried out only by varying the basis of appraisement in the manner indicated in cases of delivery bonds on seizures of property in warehouses."

With all deference, I must be allowed to observe that the proposed variation seems to me to introduce a discrimination between importers of different classes not justified by reason or law.

It is admitted that if the duties have been paid, and the goods are seized in the hands of the importer, he can only obtain them by giving bond for their full market value, or, in other words, by securing the repayment, in case of condemnation, of the value he receives when the goods are delivered to him. On what ground should the importer, who has made a warehouse entry, be put in a better position?

He also asks for and receives property which he can at once convert into money, and for which he can obtain by sales the sum he is required to pay in case of

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condemnation. The goods are worth that sum to the government; and what right has he to ask the government to surrender them without receiving a bond for their full value?

I confess, that after the fullest consideration, I have been able to discover nothing, either in the warehouse laws or the provisions of section 89 of the act of 1799, which can give any color to such a pretension.

I regret exceedingly to be obliged to dissent from any opinion entertained by the distinguished judge of the southern district of New York, especially when it is sustained by that of his eminent predecessor.

But I cannot avoid announcing the conclusions which, after the best consideration I can give the subject, I have reached. My belief in their correctness is strengthened by the fact that they seem to be in accordance with the views entertained by the learned judge of the Pennsylvania district, whose decision, which I have not had the advantage of seeing, is referred to in the opinion of the district judge of the southern district of New York.

An order must be entered directing the goods seized to be delivered to the claimant, on his executing a bond for their appraised value, without deducting the duties, and on the production of the collector's certificate that the duties have been paid.

Order accordingly.

NOTE.—See also the next case in the text; *United States v. Three Horses*.

The following is a fuller statement of the opinions referred to by Judge HOFFMAN, rendered by Judge BLATCHFORD in the southern district of New York, and Judge CADWALADER in the district of Pennsylvania, respectively.

The opinion of Judge BLATCHFORD was delivered in the case of *Four cases Silk Ribbons*; and is reported in full, 1 *Ben. D. Ct.* 214.

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After referring to previous unreported decisions in the southern district of New York, upon the same question, the opinion proceeds :

Under the acts on which the libel in this case is founded, the penalty imposed is the forfeiture of the goods. If the goods are not warehoused, but are entered for consumption, and the duties on them are paid, and they are, when seized, in the hands of the importer, he loses, if the goods are forfeited, the duties which he has paid, and the goods also. As the duties on the goods have been paid, those duties enter as an element into the value of the goods at the time of their seizure ; and the government, in availing itself of the provisions of section 90 of the act of March 2, 1799, in case the goods are condemned and not delivered on bond to a claimant, and selling the goods at auction to the highest bidder, receives the market value of the goods, of which value the duties form a part. The government receives just what the importer loses. If, after the government, under such circumstances, seizes the goods for forfeiture, they are bonded at their market value, then, in case they are condemned, the government receives and the importer loses the same amount as if they were not bonded, that is, the duties which have been paid, and the value of the goods in market, into which value the duties enter as a constituent part.

If the duties on the goods have not been paid, and the goods are, when seized, in warehouse under the warehousing acts, with a bond to secure the duties, the property is in a very different situation from that which it is in when it is not warehoused, but is seized in the hands of the importer, after a consumption entry and after the payment of duties. The interpretation uniformly given to section 89 of the act of March 2, 1799, is that the sum at which the property seized is to be appraised is its value as of the time and place of seizure. The theory is, that the government is entitled, on a forfeiture and condemnation, to the value of the property as it stood at the time of the seizure—at the time it thus came into the hands of the government. When the property is not warehoused, but is seized after a consumption entry, and after the duties on it have been paid, and is then condemned, this theory is carried out by causing the importer to lose and the government to receive, either by a sale of the property, or by a suit on the bond given to procure its release after arrest, what was its value as it came into the possession of the government at the time of its seizure. It is true that, under such circumstances, the government receives, on the consumption entry, the duties on the property, and that afterward those duties enter into the price or value which the government receives for the property, after it is condemned ; and thus, according to a form of speech, the government may be said to receive, and the importer to pay, the amount of the duties twice. But this is a fallacy.

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The duties are first paid as duties on the consumption entry, and then the property becomes part of the common stock of the country, and enters into its markets, and has a merchantable value, composed of all the elements which go to make up such value; such as cost of manufacture, freight, commissions, duties, mercantile profit, and other items. That value it is, which, when the property is seized under such a state of facts, passes from the importer to the government; and the importer necessarily loses the duties he has paid, and the money value of the property, which otherwise would have gone into his own pocket—no more and no less. But when the property is in warehouse, under a bond to secure the duties, it is there subject to withdrawal for consumption on payment of duties, or to withdrawal for re-exportation without payment of duties. If seized while so in warehouse, it has, at the time of seizure, a value composed of very different elements, so far as the question now under consideration is concerned, from those which compose its value when it is not in warehouse, but is seized in the hands of its importer, after a consumption entry and after the payment of duties. If sold by the importer while so in warehouse under bond, the duties do not form an element of its price or value. The purchaser pays to the importer the value of the property, not including any duties, and afterward pays the duties on withdrawing the property for consumption, or re-exports it without paying duties. The property cannot, while in warehouse under bond for the duties, be put into market for consumption, so as to have the duties enter as an element into its value; and if it is withdrawn for re-exportation, the duties can never enter into its value in any market in this country under its existing importation. These views show, that when property in warehouse under bond for duties is seized, the duties form no part of its value at the time it is seized. Now, applying the remedies which the law gives to the government to this state of facts, these consequences follow. If the government enforces the forfeiture, and the property is not released on bond, but is sold, the government receives for it, by putting it into market, a price into which the duties enter as a component part (the property, when sold, being put into competition with other property of the same kind which has paid duties), and thus the government receives not only what was the value of the property to the importer at the time of the seizure, but also an additional value representing the amount of duties. Thus, the government virtually receives the duties on the property, and also its value at the time of seizure. It receives what the importer ought to lose, namely, the value of the property to the importer at the time of its seizure; and it also practically receives the duties, by receiving the same price for the property which it would bring if it had paid duties. It also claims the right to

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enforce against the importer the bond for duties given on the entry for warehouse. If it should be allowed to enforce that bond, then, in such case, as in the case where the property was condemned and sold on being seized while not in warehouse, but while in the hands of the importer, after a consumption entry and after the payment of duties, it would seem to receive the amount of the duties twice. But this again is specious. The bond for duties given by the importer, if enforceable, would be enforced by reason of the voluntary act of the importer in giving it. The transaction of giving such bond, and any rights of the government under it, are separate and distinct from the rights acquired by the government by virtue of any fraud which justifies the seizure of the property. As to what the government receives as representing duties when it sells the property in market, it receives that as an incident of sovereignty. The property has virtually been imported by the government itself, and it has the right to put it into the market, and all it receives for it, as representing duties on like property, is clear gain. But such gain arises from the principle that the government pays no duties on articles imported by itself. If the government imports property which is afterward sold by it, it receives on the sale a price into which the amount of duties on like property, when imported by an individual, enters as a constituent part, and the gain thereby accruing to the government is an inherent incident of its sovereign right. But, although the course of proceeding in the case of a sale on forfeiture where the goods are in warehouse under bond, may bear the semblance of giving to the government the amount of the duties on the property twice, in addition to the value of the property to the importer at the time of its seizure, yet the importer loses nothing but what was the value to himself of the property at that time; and, if the bond given by him for the duties is enforced, he loses those also.

At this stage comes up the question now presented for discussion. If the property proceeded against in this suit is released on a bond such as the government insists on—namely, a bond for the value of the property when seized, including the duties—and the property is condemned in the suit, the government will receive, under such bond, not only the value of the property to the importer at the time of seizure, but also an additional value, representing the amount of the duties; and, besides that, it will receive the duties imposed by the collector, in case the goods are withdrawn for consumption. It will thus receive, in all, just what it would receive in case the property were condemned and sold, on its seizure while not in warehouse, but while in the hands of the importer, after a consumption entry, and after the payment of duties. And it will not receive that full amount, if a bond for the value, less the duties, is given. But it has been already shown that the

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warehousing system introduces a change, to the full benefits of which the importer is entitled. Where the property is not warehoused, the government receives the duties; and if it afterward seizes and condemns the property, it receives its full market value. If the property is warehoused, and then seized, condemned, and sold, without being delivered to the claimant on bond, the government acquires the title to the property, and sells it in like manner as if it had itself imported it. But in case such a bond as the government claims to receive in the present case is given, the importer will, as we have seen, lose, if the property is condemned in the suit, not only what was the value to him of the property, in warehouse, at the time of its seizure, but, in addition, a sum equal to the amount of the duties legally chargeable thereon; and if, after thus bonding the property, he withdraws it for consumption, he must pay the duties on it in cash to the collector, notwithstanding the amount of them has been included in such delivery bond. He will thus, in case of a condemnation, lose more than he would if the property were not delivered to him on bond, but were to remain in the hands of the government, and be sold by it. In each case, the same offense is charged and has been committed, for which the property is forfeited. In each case the property is in warehouse, under bond for the duties. The merchandise is equally guilty in each case; but, if the claimant seeks to avail himself of the privilege of bonding his property when it is seized while in warehouse, he cannot do so, according to the views urged by the government, without imposing upon himself a liability, in case the property is condemned, which he will not incur if he leaves the property in the hands of the government. To require from the importer such a bond as the government claims, would be to deprive him practically of the benefit of bonding warehoused property seized and prosecuted while in warehouse. But if the property is delivered to the claimant on a bond for its value when seized, not including the duties, then, if the property is condemned in the suit, the importer will lose the same amount as if he had not bonded the property, and no more; and will thus have the full benefit of the privileges of the warehouse system, and the full benefit of the system of bonding provided by section 89 of the act of 1799.

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The opinion of Judge CADWALADER was delivered in the case of *United States v. Segars*, and is reported 16 *Leg. Int.* 388; 8 *Phil.* 517.

After stating the facts and reviewing the various provisions of acts of Congress bearing upon the assessment of duties, both such as the

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opinion denominates *regular* duties, and those termed *additional*, it proceeds:

The present question, however, concerns the *regular* duties only. The question is whether the amount of these duties, which is to be paid by the claimant at all events, is to be deducted by the appraisers in their ascertainment of the value for which he is to give the bond. The question, in other words, is, whether, if judgment of condemnation be rendered, he is to *lose the amount of these duties as well as the value of the property forfeited*.

A series of subsequent laws has established a system of appraisement under which all subjects of *ad valorem* duty are valued by sworn public officers. These laws have imposed, in certain cases, a penal increase of the duties upon imported merchandise invoiced at a designated rate below the proper valuation. It is also indictable as a misdemeanor to make out, or pass, or attempt to pass, any false, forged, or *fraudulent* invoice through the custom-house. In the cases reported in 16 *Pet.* 842; 3 *How.* 197; and 17 *Id.* 85, the supreme court has decided that these enactments have not impliedly repealed the provision in section 66 of the act of 1799, that where imported goods are falsely invoiced with a design to evade the payment of any part of the duties, the goods or their value are liable to forfeiture. In the last of these cases the court say that if the *additional* duty of twenty per cent., imposed when the appraised value exceeds the invoice price by ten per cent., has been levied upon the goods by the government, it cannot forfeit them under section 66 of the act of 1799, but if the collector is satisfied that such an undervaluation in the invoice has been made with intent to evade the duties, then, instead of levying the *additional* duty, a forfeiture may be declared. The court added that a forfeiture may be declared in cases of undervaluation of less than ten per cent. of the invoice price where the fraudulent design exists. 17 *How.* 98, 94. If the court had been of opinion that *no duties whatever* could be levied upon *forfeited* goods, they would not have made this remark distinctively as to the *additional* duty alone. The distinction between the *additional* and *regular* duty was recognized conversely in *Stairs v. Peaslee*, 18 *How.* 521, 529, in certain remarks of the court upon the case of *Bartlett v. Kane*, 16 *Id.* 263. In this case, goods entered at the invoice price had been found by the appraisers to be invoiced ten per cent. below the dutiable value. The penal duty of twenty per cent. had therefore been exacted. A portion of the goods were warehoused, and afterwards entered for exportation. On these goods the *regular* duty was returnable to the importer. But the court was of opinion that the collector could retain the *penal* duty upon them, which had been levied. The

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reason of the distinction had been partially indicated in the previous case of *McLane v. United States*, 6 *Pet.* 404, 427. There prohibited goods, which could not regularly have become dutiable, were the subject of consideration. The supreme court said that "no duties, *as such*, can legally accrue upon the importation of *prohibited* goods," assigning as the reason that "they are not entitled to entry at the custom-house." This language implies that the contrary should be the rule as to such *forfeited* goods as have been or ought to have been entered at the custom-house. The liability of the importer for the duties upon goods of the latter class depends upon a personal contract implied in his act of importation. But the implication of such a contract cannot be extended to a *penal* addition to the duty. It may, for some purposes, be extended so as to include such a simple addition to the invoiced value as the appraisers may make without a *penal* increase of its amount. But this is not the rule for the purposes of section 89 of the act of 1799, under which the proper assessment of the duties is upon the invoice as if it were fair and unimpeached. This rule could not here be departed from without prejudging, more or less, the question for ultimate adjudication. A case in which a forfeiture is insisted upon should not be thus prejudged in any degree in a preliminary stage of the proceedings.

The existence and character of the distinction between the additional and the regular duty having been thus ascertained, we may now consider some authorities which bear less indirectly upon the question whether an importer of dutiable goods is liable, personally, for the duties upon them when they are forfeited. Hereafter the word *duties* will be understood as designating what have hitherto been called *regular* duties.

Salter v. Malapert, 1 *Roll.* 383, was an action of debt for the recovery by farmers of the customs of a statutory duty of twelve pence in the pound for goods imported by foreign merchants and unladen without payment of the duty. The farmers had received the grant of the customs, but not of the forfeitures. These the king had reserved. The importers had compounded for the forfeiture with the king, and pleaded this in bar of a suit against them by the farmers for the duty. The plaintiffs demurred to the plea. Judgment was given for the plaintiffs. The reason of the judgment, as delivered by Chief Baron TAXFIELD, was that the duty of a shilling in the pound became a debt upon the bringing of the goods into port, when the plaintiffs acquired a vested right of action. Upon the authority of this decision, Chief Baron COMYN (*Com. Dig.* Debt A. 9), under the head of *debt upon contract implied*, states the law to be that debt lies for *customs due for merchandise*, though the goods are *forfeited for non-payment*.

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In *Swinerton v. Wolstonholme*, reported by Sir M. Hale, in his treatise on the Customs (*Harg. L. T.* 214), the reason upon which the above decision is founded was reconsidered. A majority of the barons of the exchequer were of opinion that the "duties grow due by the unloading." The opinion afterwards entertained in England by the crown lawyers appears to have been that the voluntary bringing of goods within the limits of a port of entry, with intent that they shall be unladen, renders them liable to duty. *Reeves on Ship.* 260, 261. In *Meredith v. United States*, 13 *Pet.* 493-496, this rule was recognized as having been established in 5 *Cranch*, 368, and 9 *Id.* 104. The court said that, in a fiscal sense, the right of the government to duties upon goods accrues on their arrival at a port of entry; that, under the credit system then in force, the duty was not extinguished by taking a bond which either did not cover the whole sum due, or was not executed by all the parties liable, and that the amount justly due might be recovered in an action of debt, although no such bond as was then required by law had been given, and might be thus recovered independently of any official or other assessment of the duties. The court said "an action of debt lies in favor of the government against the importer, for the duties, whenever by accident, mistake, or fraud, no duties, or short duties have been paid." See also *United States v. Lyman*, 1 *Mas.* 482.

In *Wood v. United States*, 16 *Pet.* 342, 362, and *Taylor v. United States*, 8 *How.* 197, goods imported at New York, after having been passed, in regular form, through the custom-house there, had been seized, in the one case at Philadelphia, in the other case at Baltimore, in the hands of agents of the respective importers. The goods, in such case, were condemned as forfeited for fraudulent undervaluation in the invoices upon which they had been entered. These cases decide that the payment by the importer to the United States of the full amount of duties assessed by the collector and naval officer upon goods passed by the appraisers of the customs at the invoiced value, and delivered under a formal permit, is no bar to such a subsequent proceeding to forfeit the goods. The success of the fraud by which the officers of the customs had been deceived, was, of course, no justification. The importers, in these cases, lost the goods as well as the amount of the duties which had previously been paid. Section 66 of the act of 1799, under which the goods were condemned, imposes, in the alternative, as we have seen, a forfeiture, either of the goods, or of their value, to be recovered of the importer. If those goods, instead of being still in the hands of the importers, or of their own agents, had been previously sold in the market, the pecuniary value could, therefore, have been recovered from the respective importers in actions of debt at the suit of

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the United States. See *Caldwell v. United States*, 8 *How.* 366. The amount of the duties previously paid could not then have been set off as a deduction from the full value which would have been recoverable.

The circumstance that the duties have not been paid when the proceeding to forfeit the goods is instituted is, in reason, attended with no difference in favor of the importer. If the proceeding is groundless, the goods are to be restored to him, but the regular duties are to be paid. If the goods are condemned, he loses them, but this does not exempt him from liability for the duties. In 13 *Pet.* 493, the supreme court cited with approbation a decision of the English court of exchequer, 2 *Anstr.* 558, that where a dutiable article was lost or destroyed by a casualty before it became available to the party personally liable for the duty, his liability nevertheless continued. If the loss of the property by misfortune does not exempt him, his loss of it from his own fraud should not cause an exemption. In the present case, if the goods are not bonded, a personal action for the duties will be maintainable against the importer. He could not plead in bar of it that the goods are the subject of a pending prosecution for an alleged forfeiture. He could not have avoided this liability by omitting to claim the goods. He cannot escape from it by withdrawing his claim, or by confessing the forfeiture of the goods, or otherwise abandoning them to the United States. The liability for the duties as a debt may thus be enforced as well before as after their condemnation.

If the goods are to be delivered to him upon substituting the proposed bond for them, it should be a substitute for their full value, not for the value less the amount of the duties which are, at all events, to be paid. The bond stands in the place of the property which, in case of condemnation, would, if no bond had been given, have been sold by the marshal. Under such a sale by the marshal, the whole proceeds must be paid into the court, if any question as to their distribution is to be determined. It may be said that as there was a lien for the duties, they must, if not previously paid, be discharged out of the proceeds when they are thus paid into court. It is true that such a lien exists, and that it may, in case of the importer's insolvency, be the only available security to the United States for the duties. But the existence of such an additional security for them cannot alter the rule of law that the importer of goods which are forfeited or forfeitable is personally liable for the duties.

In *Hoyt v. United States*, 10 *How.* 109, 187, goods had under a petition like the present been appraised, and a bond given for the appraised value. They were afterwards condemned, whereupon the amount of the bond was paid into court. The collector, naval officer, and surveyor were entitled to, and received, one-half of this amount,

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and the United States the other moiety. The collector, suggesting on behalf of himself and his brother officers, that the amount of the duties on the goods had been deducted from the valuation before the return of the appraisement, and that the sum paid into court was therefore less by that amount than the full value of the forfeited goods, insisted that the duties were a part of the forfeiture, and that their amount should be divided by the United States with the officers. In support of the position thus assumed, it was contended that *no duties are demandable upon forfeited goods*. The opinion of the court contains an abstract of the relevant provisions of sections 89, 90, and 91 of the act of 1799. The decision was, that when the claimant elects, under their provisions, to give a bond and pay the duties, with a view to the delivery of the vessel or goods to him, "the duties thus paid constitute no part of the proceeds of the goods forfeited." The court, in arriving at this conclusion, remarked, incidentally, that if the vessel or goods are condemned, the claimant "*loses as well the duties paid or secured, as the property seized and condemned.*" This could not be the case if the amount of duties had been deducted by the appraisers from their valuation, before its return to the court. The case might have been adjudged without a decision of this question. But the simplest mode of adjudication was to decide the question; and this mode was adopted. The question, therefore, cannot be considered as an open one. Consequently these goods are to be appraised at their market value here, from which there should be no deduction.

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*District Court; Eastern District of Michigan,
March 7, 1870.*

COLLECTION OF DUTIES.—BOND FOR RETURN OF SEIZED
GOODS.

Under section 89 of the duties collection act of 1799,—which allows goods seized for non-payment of duties to be appraised, and delivered to the owner upon his giving a bond for the payment of the appraised value and producing a certificate that the duties have been paid or secured,—the *certificate* should show payment of all burdens or taxes imposed upon the property by the United States as the condition of allowing it to be imported; including any sum imposed under the act of March 8, 1865, authorizing an additional sum of twenty per cent. *ad valorem* to be levied in cases where the appraised value shall exceed ten per cent. more than the value at which the goods were entered.

The *bond* to be given under section 89 of the act of 1799, should be for the actual cash value of the property at the time and place of seizure, without deduction for duties paid, where the property has been seized in the hands of the importer.

It seems, that, where the goods have been seized *in warehouse*, the duties may be deducted, in determining the amount for which the claimant must give bond.

Petition for return of goods seized as unlawfully imported.

The custom-house officers having seized certain live stock upon an information alleging that it had been imported without payment of full duties, John O'Rourke, the owner and claimant of the property seized, presented a petition setting forth that he entered the property at the custom-house at Port Huron, at the sum of three hundred and eighty dollars and

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fifty cents, in gold, and paid the duties imposed by law at that valuation,—namely, seventy-six dollars and fifty cents, gold; and praying for an order that the property be delivered to him upon his producing the requisite certificate of the payment of that amount of duties, and upon the execution of a bond for the payment of the sum at which the property might be appraised as required by law; and that, for that purpose, the property might be appraised at its cash value at Port Huron, less the duties legally chargeable upon it.

It appeared that the property was imported in March, 1870, and was entered at the amount stated in the petition, and the duties on that amount were paid. The collector, however, caused a new appraisement to be made, which showed the true value of the property in Canada, whence it was exported, to have been seven hundred and fifteen dollars. This being more than ten per centum above the sum at which the property was entered, the collector, after levying the full amount of duty imposed by law, levied in addition thereto a duty of twenty per centum *ad valorem* on such appraised value, under section 7 of the act of March 3, 1865, 13 *Stat. at L.* 493, providing that, in such cases, “in addition to the duties imposed by law”
• on the property, “there shall be levied, collected and paid a duty of twenty per centum *ad valorem* on such appraised value.”

None of the duties had been paid, over and above the seventy-six dollars and fifty cents paid on the sum at which the property was entered. The property was in the hands of the marshal by whom it had been seized, under the information filed, while in the hands of the importer.

A. Russell, for the petition.

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A. B. Maynard, District-Attorney, and *I. W. Finney*, for the United States.

LONGYEAR, J.—This application is founded on section 89 of the act of March 2, 1799, 1 *Stat. at L.* 696. That statute provides that in such cases the goods, &c., shall be appraised, and on the return of the appraisement, if the claimant shall give a bond as prescribed by the section, for the payment to the United States of a sum equal to such appraisement, and shall, moreover, “produce a certificate . . . that the duties on the goods . . . have been paid or secured in like manner as if the goods had been legally entered,” the court shall order such goods, &c., to be delivered to such claimant.

The questions presented for decision are:—*First*. What “duties” are required to be certified as paid in order to entitle the claimant to a delivery of the property?—and, *Second*. Should the appraisement be the value of the property less the duties paid, or the full value without deduction?

These questions do not appear to have been heretofore presented to this court. The second question, however, does appear to have been presented and fully considered by Judge BLATCHFORD in the district court for the southern district of New York, in the case of *Four cases of Ribbons*, 1 *Ben. D. Ct.* 214.*

1. As to the first question,—what duties must be certified to have been paid,—the statute specifies “the duties on the goods, &c.” What are “the duties on the goods” in this case? The term “duties” is clearly meant to and does include all burdens or taxes imposed upon property imported into the country, and all other burdens or taxes upon such property declared to be such by law. *First*. There is twenty per centum

* *Ante*, 416.

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ad valorem upon the actual value at the place from whence the property is exported. In case an appraisement is made by the collector, as in this case, such appraisement must be taken to be the actual value until set aside by higher authority, under certain proceedings prescribed by statute, but which have not, in this case, been resorted to by the claimant. *Second.* The additional twenty per centum *ad valorem* required to be levied, &c., by the act of March 3, 1865, in case the appraised value shall be ten per centum more than the sum at which the property was entered. This is expressly declared by the act to be "duty." It may be said that this additional levy is in the nature of a penalty; but the statute prescribes that it shall be "levied, collected, and paid," as "duty." There is no room for construction here. The statute fixes its character, and there can be no doubt the word "duties" in section 89 includes not only the original duty of twenty per centum, but also the added duty of twenty per centum, both to be estimated upon the value as appraised by the collector. The words "have been paid," &c., "*in like manner* as if the goods," &c., "had been legally entered," refer to the *manner* of payment, &c., and not to the amount to be paid.

The certificate, therefore, must show the whole amount of duties paid, including the twenty per centum added duty.

2. The appraisement must be the actual cash value of the property at the time of the seizure. The property was seized in the hands of the importer. This presents a very different question from that of a case of goods seized in warehouse. Goods in the hands of the importer have entered into and form a part of the general stock of the country, and are worth in cash just what any such goods are worth at the time and place of seizure, and such market value is the same whether the duties have been paid or not. In fact, the legal duties

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to which imported goods are subject enter into and constitute a part of their value in the hands of the importer, and to deduct these duties would be to appraise the property at so much less than its actual value.

Not so with goods seized in warehouse. In that case the goods have never entered into the consumption of the country, and constitute no part of its general stock. Such goods cannot be placed in market without first paying the duties. Such duties may never be paid, because the goods may be re-exported. At the time of the seizure the goods are virtually in the hands of the government, and have been from the moment they touched our shores, and there they must remain until they are released on payment of duties, or for exportation, or on a bond for their value under section 89 of the act of 1799. The value of such goods at the time of seizure, therefore, is evidently what would be their market value if they had entered into the consumption of the country, at the place of seizure, less the amount of duties required to be paid to bring them into market.

This distinction between goods in the hands of the importer and goods in warehouse is clearly and distinctly recognized in the case of *Four cases of Silk Ribbons*, before cited. 1 *Ben. D. Ct.* 214. I entirely concur in the reasoning and conclusions of the learned district judge in that case.*

The appraisement, therefore, must be the actual cash value of the property at Port Huron, at the time of the seizure, without any deduction, and a certificate of the payment of the full amount of duties levied, including the added duty of twenty per centum, must be produced before the property can be delivered to the claimant.

* *Ante*, 416.

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UNITED STATES v. SHEPARD.

*District Court; Eastern District of Michigan,
June T., 1870.*

ARREST OF OFFENDERS.—EXAMINATION.—CRIMINAL
INFORMATIONS.

Where a motion to quash an indictment is founded upon the allegation that no evidence whatever of defendant's guilt was adduced in support of the application for a warrant for his arrest, the court may inquire into this allegation, and, if it is established, quash the indictment; though they cannot inquire into the sufficiency of such evidence, if any was produced.

A certified copy of an information filed for an offense against the laws of the United States, without copies of some oath or affirmation to facts showing probable cause to believe the defendant guilty, does not authorize issuing a warrant of arrest.

It is not lawful to arrest a person in one district, for an alleged offense against the laws of the United States, and remove him to another district for examination; nor can a district judge authorize such removal. The offender, upon being arrested, is entitled to be taken before the proper officer of the district in which the arrest is made, for examination; and if probable cause is not shown, or if (the case being bailable) he gives bail, he is entitled to be discharged. It is only after a commitment upon the results of such examination that an order can be made to remove him to the district in which the trial is to be had.

Criminal proceedings in the courts of the United States are according to the course of the common law; except so far as has been otherwise provided by the constitution or acts of Congress. They are not affected by the laws of the several States.

Hence it is not necessary that the names of witnesses for the prosecution should be indorsed on the indictment or information preferred in one of those courts; although such indorsement may be required by statute of the State.

An offense against the laws of the United States, which is of a charac-

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ter not capital or infamous, may be prosecuted in the courts of the United States, by an information, according to the course of the common law.

The proper course of proceeding in issuing a criminal information explained.

Motion to quash an indictment.

In September, 1869, the district-attorney filed an information in the district court for the eastern district of Michigan, against G. Shepard. The offense with which the accused was charged was the knowingly and fraudulently bringing into the United States certain personal property in violation of section 4 of the act of July 18, 1866, 14 *Stat. at L.* 179.

- The defendant having been arrested upon this charge, and having given bail, now moved to quash the indictment.

A. B. Maynard, District-Attorney, for the United States.

Alfred Russell, for the defendant.

WITHEY, J.—The facts exhibited as the grounds of the motion are, that the information upon which the government seeks to hold the defendant to answer and trial, was filed by the district-attorney without oath or proof of probable cause, and without application to or leave of court. Before the information was filed, complaint was made before a commissioner at Detroit, and a warrant for the arrest of the accused was issued to the marshal of the eastern district of Michigan. But the accused being absent from the city no arrest was made upon the warrant. The information was then filed by the district-attorney, as above stated. As no arrest could be or was made upon the warrant issued by the commissioner, the arrest and holding to bail

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rests solely on the information. A certified copy of the information was taken to Chicago, when the district judge of the northern district of Illinois, on proof of the identity of the accused, but upon no other evidence of probable cause than such copy, indorsed thereon his warrant for the arrest of defendant, and for his removal to this district for trial.

Defendant was arrested and brought to this city; here he was taken before the United States commissioner, waived examination, and gave bail for his appearance to answer the charge contained in the information.

The court will consider three questions involved by the motion to quash.

1. Was the arrest lawful, and, if not, can the defendant be held to answer?

2. Is the information legally sufficient, the names of the witnesses for the prosecution not being indorsed thereon?

3. Can a person be held to answer for an offense, not capital or infamous, on an information filed by the law officer representing the government?

The first question is answered by the fourth constitutional amendment, which declares that "no warrant of arrest shall be issued but upon probable cause, supported by oath or affirmation," &c. Had there been any showing for the arrest at Chicago, supported by oath or affirmation, this court could not inquire whether the showing was sufficient to justify the issuance of the warrant by the district judge of Illinois; but when it is alleged there was no showing supported by oath or affirmation, and the illegality of the warrant is made the basis for arresting all further proceedings in the cause, it is our duty to inquire whether the fact is as asserted.

We have already stated what is proved here,—namely, that the certified copy of the warrant was all

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We have already stated what is proved here,—namely, that the certified copy of the warrant was all

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that was shown to procure the order of arrest. The constitution declares that "no warrant of arrest shall issue but upon probable cause," &c. ; the information is not supported by oath or affirmation ; it follows, as a corollary, that the warrant was not authorized. There was no proof of probable cause, supported by oath or affirmation to justify it. Doubtless, the learned judge who issued the warrant, acted upon the presumption that the proceedings here had been such as to establish probable cause ; treating the information as having been filed upon cause shown, and regarding the certified copy as affording the same evidence as a certified copy of an indictment would furnish, when the evidence of probable cause is presumed to have been given to the grand jury. It now turns out that the proceedings anterior to the issuance of the warrant, laid no foundation for the arrest, and all proceedings based upon such unlawful arrest must fail.

Under the question we have been considering, a point was made that the warrant to remove defendant from Chicago, in one district, to Detroit, in another district, was unauthorized under the facts exhibited. The only act of Congress upon the subject of the arrest and removal of offenders against the laws of the United States, is that of September 24, 1789, § 33, 1 *Stat. at L.* 91, in reference to removal of offenders in one district, to be tried in another. It is this : "If such commitment of the offender . . . shall be in a district other than that in which the offender is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender . . . to the district in which the trial is had." By consulting the previous portions of this section, in connection with the clause I have read, it will appear that the warrant of removal is authorized only where the offender has been first ar-

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rested and committed for want of bail, in a bailable case. The statute does not seem to contemplate or warrant removing a person from one district to another in the summary way pursued in this case. He is first to be taken before the proper officer, who is to examine as to the crime alleged against the accused. If there be not probable cause of his guilt, he is entitled to be discharged; whereas, if there be found reasonable cause for holding the accused to answer, upon tendering sufficient bail, he is entitled to his discharge from arrest. Only on failure to give bail, in a bailable case, can he be committed.

Defendant was at liberty in the city of Chicago; was arrested and immediately removed to Detroit, without opportunity to confront the charge at the place of his arrest. We are at a loss to understand how the defendant could thus be dealt with under the statute. Suppose defendant had been a resident of Galveston, in Texas, or San Francisco, in California, instead of Chicago, and was thus arrested and summarily removed nearly across the continent, before having the opportunity of meeting the charge on which he was arrested. We will suppose, when examined here, before the proper officer upon the charge, it should turn out that the charge is not sustained. Does not this plainly illustrate the wrong and injury which may be done to a citizen under such forms of legal proceedings? We regard the removal as having been wholly without the authority of law.

In reference to the second question, we remark that State laws do not control in criminal proceedings in the United States courts, either in the mode or form of charging the offense, in the rules of evidence, or in the manner of conducting the trial. On the contrary, the proceedings throughout are according to the course of the common law, except so far as has been otherwise provided by the laws of Congress or by constitutional

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provision. *United States v. Reid*, 12 *How.* 365. It was not required by the common law that the names of witnesses for the prosecution should be indorsed on the indictment or information, and there is no act of Congress requiring it. In treason a list of the government witnesses is to be furnished to the accused. The Michigan statute does require the names to be indorsed on the indictment; but if the State statute governed our proceedings we should regard this provision as directory, and the omission as not affecting the validity of the indictment or information.

The other question to be considered presents an interesting inquiry. We have said the common law governs in criminal cases in the United States courts; hence the question whether the accused can be held to answer to a criminal information must be solved by determining, first, what is the common law on that subject; and second, what modifications have been effected through the laws of Congress or the constitution. The English system of jurisprudence brought by our ancestors as the common law, and those statutes of Parliament applicable to the situation of the colonies, which extended to them and were adopted by usage or acts of Assembly, have been by the United States courts held to be the common law of this country. 5 *Pet.* 241; *Patterson v. Winn*, 1 *Baldw.* 558.

At the time of the revolution and of the adoption of the constitution, it was the practice in the court of king's bench for the king's attorney-general to file informations in the name and behalf of the king, in a class of cases not above the grade of misdemeanors, without any previous showing to the court, but in the discretion of that officer. This discretion was not, however, exercised, except in cases where the offense tended to disturb or endanger the king's government, or to molest him in the regular discharge of his royal functions, and where delay would be dangerous.

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There was another class of offenses of the same grade, which could be proceeded against by information filed by the master of the crown office—a person appointed as the king's attorney to prosecute in behalf of the public, on complaint made by a subject or by a common informer. This officer could not substitute an information for the indictment of a grand jury, unless upon a showing and leave of court. The practice was to present affidavits of the offense, and move the court for a rule on the accused to show cause, and if the affidavits were not sufficiently answered leave was granted to file a criminal information in cases below the degree of felony. 4 *Black. Com.* 308-9, 311; 1 *Ch. Cr. L.* 845-6, 849, 856.

Now what changes have been produced by the constitution or laws of the United States, affecting the practice in form or substance, so far as regards the question at bar? Congress has passed no law on the subject, and the only constitutional provision affecting the question is the fifth amendment, proposed the same year that the original instrument went into operation—1789. It declares, "No person shall be held to answer for a capital or otherwise infamous crime, unless upon a presentment or indictment of a grand jury," &c.

Congress by proposing, and the States by ratifying that amendment, left all offenses not capital or infamous to be prosecuted by information or by indictment, as the circumstances of each case should seem to require, and as the common law would sanction. Indeed, this constitutional provision produced no change in the practice or law, except, perhaps, as regards a class of misdemeanors regarded as infamous crimes, and which might, before the amendment, be prosecuted by information. The amendment, however, fixed the matter, beyond the power of Congress or the courts to alter the course of proceeding in bringing forward a

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charge of crime, in the class of cases embraced by the provision.

We regard the converse of the fifth amendment to be that persons may be held to answer for crimes other than such as are capital or infamous, upon information or indictment, according to the course of the common law. We have examined all the cases referred to by counsel, and find no well considered decision which conflicts with the views we have expressed, and therefore we conclude that, so far as the question rests on the common law, it is the right of the government, by its proper law officer, the district-attorney, to charge offenses against individuals through the forms and mode of informations.

There are, however, two considerations growing out of this subject, to which we should allude to give a proper understanding of our full views. It was said on the argument that the usage since the organization of the United States courts, has been to present offenders, in all classes of criminal cases, only through the instrumentality of a grand jury by indictment. If the practice of prosecuting by criminal information has fallen into disuse for eighty years, it certainly presents a strong reason for urging that such proceeding has become obsolete. Our reply, however, is, that the fifth amendment, adopted almost at the start of the government under our present constitution, recognized the right to pursue the common law course by criminal information, in all but capital and infamous crimes. And if such rights existed then, not only at common law, but by clear implication in the fifth amendment, as we have shown, then, even though such right has been in abeyance for eighty years, there has been no abrogation of the power of the government to assert that right, particularly as the courts do not seem to have refused, by any well considered case, the exercise of such right,

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though we find some intimations by the courts adverse to its exercise.

The other consideration concerns the necessary preliminary steps before the right to file a criminal information can be asserted. We incline to the opinion and hold that there must first be a complaint, supported by oath or affirmation showing probable cause, followed by an arrest and examination, agreeably to section 33 of the act of September 24, 1789.

If the accused is held to bail or committed, the district-attorney, on filing the magistrate's or commissioner's return, with the proofs, will have leave to file a criminal information.

This course would seem as nearly adapted to the method of procedure in these courts, and to our laws, as any thing which suggests itself. It would certainly be quite foreign to any known practice in the United States courts to pursue the English practice of requiring a rule for the accused to show cause before the court, and there contest the question whether the evidence justified placing him upon trial.

The right of the accused to contest the probable cause shown by the prosecution is secured to him on his examination before the commissioner or magistrate, under the complaint on which he was arrested.

We ought, perhaps, to remark that the position assumed by the defendant's attorney, that the charge in this case involves a felony, is not sustained. The fact that the accused is liable on conviction to be imprisoned in the penitentiary does not determine the offense to be a felony. On the contrary, a felony at common law embraces only such crimes as are punished capitally. Nor is it an infamous crime; for if the defendant should be convicted on such charge it would not render him incompetent to testify as a witness, as would be the result if it were a *crimen falsi*. Neither

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does the charge necessarily involve perjury—which would be a *crimen falsi*, and infamous.

The information in this case, as we have shown, was filed without right or authority. The arrest and holding to bail were also unauthorized ; and for both grounds the court must refuse to hold the accused to answer.

Motion granted.

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Circuit Court, Sixth Circuit ; Eastern District of Michigan, March T., 1870.

INVALIDITY OF PREFERENTIAL ASSIGNMENTS.—WHAT IS INSOLVENCY.

When an insolvent debtor gives a mortgage in favor of one creditor, with intent to secure to him a preference over other creditors, and such creditor has, at the time, reasonable cause to believe the debtor insolvent, the mortgage is void, by the provisions of the bankrupt law of 1867.

If, from the circumstances under which the mortgage was given, it must necessarily have operated as a preference, the creditor will not be heard to say, in support of the transaction, that the debtor did not intend to create one.

The question of insolvency is a question of fact, and depends, in part, upon the usage and understanding which prevails in the locality with reference to which the question arises.

The rule that a trader who is not able to pay all his debts in the usual ordinary course of business as persons carrying on trade usually do, is to be regarded as insolvent,—approved, as a general rule.

Failure to pay a single debt when due, is not sufficient to establish insolvency.

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Hearing upon a bill in equity.

This bill was filed by Frederick E. Driggs, as assignee in bankruptcy of the estate of Tonkin & Trewartha against the persons composing the firm of Moore, Foote & Co., to recover assets of his assignors, which defendants had sold in virtue of a claim to them under a mortgage executed by the assignors.

Driggs & Pond, for complainant

Meddough & Lothrop, for defendants.

WITHEY, J.—Tonkin & Trewartha, of Eagle Harbor, in the upper peninsula of Michigan, being indebted to defendants, merchants of Detroit, for merchandise, and also on a claim transferred to them in favor of Allan Sheldon & Co., amounting in the aggregate to about twelve thousand dollars, on May 9, 1868, to secure the payment thereof, executed to the defendants a chattel mortgage on all or nearly all their personal property, including two stocks of goods at Eagle Harbor. To induce the giving of the mortgage, defendants extended time for payment, so that the first payment of eight hundred dollars would become due July first after the date of the mortgage, and a like sum monthly thereafter until the whole sum of twelve thousand dollars, with interest, should be paid. On July 15, the first installment not having been paid, defendants took possession of the mortgaged property, and a few days after sold the same at public vendue. On August 3, Tonkin & Trewartha filed a petition to be declared bankrupts, and were afterwards duly adjudged to be such. Their assignee, the complainant, files a bill against defendants to recover the value of the property taken and sold under said mortgage, alleging that the mortgage was made within four months before the pe-

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tition in bankruptcy ; that Tonkin & Trewartha, at the date of the mortgage, were insolvent ; that it was made with a view to give a preference, and that defendants had reasonable cause to believe their debtors insolvent, and the transaction to be in fraud of the provisions of the bankrupt act. The giving of the mortgage, and the then insolvency of Tonkin & Trewartha, are admitted by the defendants, but they deny that their debtors made the mortgage with a view to give a preference, and deny that defendants had reasonable cause to believe their debtors insolvent, or that the mortgage was made in fraud of the provisions of the bankrupt law.

The bill of complaint presents a case under the first provision of section 35,—viz: of a transfer with a view to give a preference ;—and it is urged by defendants' counsel that this provision is not within the operation of the third paragraph of the section, which declares : " And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

The question is, what " sales, assignments, transfers, and conveyances " are referred to in the clause just read ? It follows two provisions, the first of which declares that " any payment, *pledge*, assignment, transfer, or conveyance," made within four months by the insolvent debtor, " with a view to give a preference," &c., shall be void ; the second, that " any payment, *sale*, assignment, transfer, conveyance, or other disposition," within six months by the insolvent debtor of his property, " with a view to prevent his property from coming to his assignee in bankruptcy," &c., shall be void.

It was said at the argument, the clause as to what shall be *prima facie* evidence of fraud, does not refer to the first provision ; among other reasons, because the word " pledge " is not in the fraud clause, and is in the first provision ; and so the word " sale," employed

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in the second provision but not in the first, is used in the third or fraud clause. The same reasoning would prevent the third paragraph from applying to either of the former provisions ; for the word "payment," employed in both of them, is not used in the fraud clause, and the words "other disposition," employed in the second paragraph, are not in the third.

The words "sale, assignment, transfer, or conveyance," employed in the third paragraph, are of comprehensive import, and embrace almost every disposition of property, whether absolute or conditional. Both the antecedent paragraphs refer to and are designed to protect the property of the insolvent, and the clause as to fraud is also designed to the same end. All these provisions relate to the same subject or thing,—namely, the property,—and all three aim to protect property of insolvents from fraudulent disposals. My conclusion is in harmony with the rulings in the courts of bankruptcy so far as decisions have come under my notice, and with the opinion of the supreme court of Massachusetts in reference to a like provision in the insolvent laws of that State.

When, therefore, it was shown in this case that Tonkin & Trewartha were insolvent, and gave a chattel mortgage of their goods to secure a debt which they owed, there was established a case of fraud *prima facie*—for that mode of transfer by a trader of his goods, is not one in the usual and ordinary course of his business, but is unusual and exceptional.

We are now to inquire whether the mortgage was made with a view to give a preference to defendants. Whether it was, rests upon the facts, and I refer to Trewartha's testimony first. He says: "I knew"—May 9, 1868, the date of the mortgage—"if we were called upon to pay all our indebtedness at the time, it would be impossible to do so ; our only hope was to

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continue in business, and by using profits yet to be made, we might pay our debts."

Next, Mr. Tonkin testifies: "In March, 1868, on reviewing the state of my business, I felt that if demands were pressed upon me for all the debts I owed, I should fall far short of paying them." And they say they were averse to giving a mortgage to defendants; they did so only when pressed, and becoming satisfied it was their only way to ward off the blow which threatened their business.

Mr. Maynard went from Detroit to Eagle Harbor in May, and obtained from Tonkin & Trewartha the mortgage on their goods, as the agent and attorney of defendants. He testifies: "Trewartha said he did not see why we wanted securities, as he had given me a full statement of their standing, and that we could see that they had a surplus of between twelve and thirteen thousand dollars. I said to him that in case security was given, I should be willing to fix the time and amount of payments to be made to suit their convenience." He then states that Tonkin "expressed some dislike to giving a chattel mortgage," and "wanted to know if they could rely upon the defendants giving them additional credit in case they should execute the mortgage. I informed them they could."

Now it turns out that the statement which Tonkin & Trewartha made of their standing to Mr. Maynard, at the time of giving the mortgage, was not truthful; that in fact they owed more than their assets amounted to. They covered up their real condition by a false statement, well knowing the result if their true condition was made known. It may be true that they hoped to work out, and one means to that end was to obtain time in which to pay their debts. The learned counsel for defendants claim that Tonkin & Trewartha's view was not to give a preference, but to gain time, and, from profits to be realized from trade, pay their debts; that

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while the mortgage has operated to give defendants preference, it is because of the failure of the mortgagors to realize their hopes and expectations, and is but an incident, and was not the object of the mortgage. It is said, too, their reluctance and aversion to giving a mortgage is evidence that they did not give it with a view to a preference.

If we pause and ascertain first, that the mortgagors knew they were utterly insolvent; that they had large indebtedness past due to these defendants and others, which they were wholly unable to pay, and that, bad as their credit was before giving the mortgage, it would be utterly gone after executing it with every one who should know of its existence—and that its existence would be open to all in the town clerk's office—there would seem no escape from the conclusion that Tonkin & Trewartha must have known and realized that a mortgage to defendants of their property would be a preference. It is wholly untenable to say, that traders who know themselves to be insolvent, can mortgage their property to secure a pre-existing debt without entertaining the view that such action is a preference. The court is to judge of the transaction from Tonkin & Trewartha's standing at the time, and if it appears that their condition was such that a mortgage must operate as a preference, it cannot be allowed, because there was a possibility of their earning in the future enough to pay all their debts, and hoped so to do, that, therefore, there was no intention or view to give a preference.

It matters not what was their principal motive; if they were actually insolvent and knew it, they will not be allowed to pledge all their property, or any part of it, to one creditor, leaving the other creditors dependent in whole or in part upon the trader's subsequent good or ill fortune in business enterprises. The court regards this view to be in harmony with the spirit and intention of the bankrupt act; any other

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view renders the provision of the law under consideration as worthless as a rope of sand, and as opening a door to evade one of the most salutary provisions of the bankrupt act.

Mr. Justice SWAYNE, in *Farrin v. Crawford*, 2 *Bank. Reg.* 182, used the following language: "Assuming, then, that he (the debtor) was insolvent and knew it, it follows at once that any payments then made by Farrin to any creditor in full, were with intent to prefer, and, therefore, acts of bankruptcy within the meaning of section 39." Section 39 employs the same language as section 35, viz: "With a view to give a preference." Hence the ruling of Mr. Justice SWAYNE is applicable to the case at bar. The court holds the mortgage by Tonkin & Trewartha to defendants to have been made with a view to give a preference.

And the question remains whether defendants had reasonable cause to believe Tonkin & Trewartha insolvent, and that the mortgage was made in fraud of the provisions of the bankrupt act. This is frequently one of the most difficult, as it is one of the most important questions arising under the law, involving, as it often does, large amounts growing out of payments, mortgages, and transfers by a debtor, and involving questions of construction and fact. Perhaps no precise rule can be laid down which will be applicable to all cases, inasmuch as the determination of each case rests largely upon its own peculiar facts. It is generally held by the bankrupt courts that a trader who is not able to pay all his debts in the usual and ordinary course of business, as persons carrying on trade usually do, is insolvent within the meaning of the bankrupt laws, and I know of no better general rule by which to be governed in considering the facts of a case. It is neither too broad nor too narrow; while, in my opinion, it would be quite too narrow and restricted to hold that failure to pay *some one debt when due* is

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evidence of insolvency in all cases under the act, though I believe it has been held that if a trader does not pay a debt when it matures, he is to be regarded insolvent. This, *as a rule* applicable to traders generally in this country, I cannot indorse. Whether a single instance of non-payment of a debt at maturity would be evidence in a given case of insolvency, depends somewhat upon the magnitude of the debt, upon the locality of the debtor, and upon what is the ordinary course of business and custom in that respect of the locality where the debtor resides, and upon such other facts and circumstances as will bear upon the question of insolvency.

Suppose a debtor residing in a small country town, in an agricultural district, or in the mining regions of this State, where debtors are not usually prompt to meet their debts as they mature, and an item of indebtedness is not paid at maturity, while at the same time the debtor is of known responsibility, having two dollars or ten dollars of assets to one dollar of indebtedness, and enjoying good credit—to say such debtor is insolvent simply because he fails to pay the debt at maturity, is obviously incorrect. It ignores the usage and course of business recognized between the creditor and debtor class in that locality, and would present the spectacle of the mercantile class saying a trader is solvent, and the courts saying he is insolvent; whereas the courts, upon such questions, should adopt the mercantile usage as the rule of decision. The question is, whether the debtor or trader is able to pay his debts in the ordinary course, as persons carrying on trade • there usually do. Hence it may be, and undoubtedly is true, that insolvency in New York, Boston, Philadelphia, and other commercial centers, is not insolvency in small country towns.

In the former places, if the debtor's paper is dishonored, his credit is gone, and he is *prima facie* in-

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solvent; whereas in the latter localities it is not so. Insolvency is a fact, and not a matter of definition or rule of law, as was said at the argument; and what is evidence of insolvency in London, or Paris, or New York, is not evidence of insolvency everywhere.

The rule first stated, that a trader who is not able to pay all his debts in the usual ordinary course of business, as persons carrying on trade usually do, is to be regarded insolvent, is sufficiently liberal to admit all the necessary tests in determining the question of insolvency.

What now are the facts from which we are to draw our conclusions, whether the defendants had reasonable cause to believe their debtors insolvent at the time Tonkin & Trewartha made the mortgage—May 9, 1868?

[The opinion here proceeds to examine extensively the facts bearing on the question whether the mortgagees had notice of the mortgagors' insolvency.]

There is, to my mind, exhibited by the facts in this case very strong reasons for defendants not only to have suspected, but believed their debtors insolvent, outside of the consideration that there was other past due indebtedness of considerable amount.

Defendants did feel extremely anxious as to the ultimate payment of their debt, as is shown by the evidence. That they distrusted Tonkin & Trewartha's solvency is apparent from their sending, on three different occasions, agents and attorneys to investigate their debtors' standing; also, from information received that there had been placed upon the debtors' stock two mortgages for considerable amounts; and again, from the fact that defendants were not only anxious to obtain security for their debt, but did not rest satisfied until it was accomplished.

Now, considered in relation to their own past due debt, it would seem to be the policy of the bankrupt act not to allow a creditor, under such circumstances,

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to take a transfer of a debtor's property by way of preference, payment, or security.

Transfers made in the usual and ordinary course of a trader's business, or payments made at the time a debt matures, and in the usual mode of paying debts, are *prima facie* valid. On the other hand, whenever a creditor is in possession of such facts and circumstances in reference to his debtor's standing as arouse suspicion with regard to his solvency or ability to meet his indebtedness, the creditor is so far put upon inquiry that he will not be allowed to shut his eyes to those facts and circumstances, and obtain payment of a debt, otherwise than as it matures, or take security or a transfer of property from the debtor to the prejudice of other creditors.

If he does so, and his debtor comes into bankruptcy within four or six months, as the case may be, the creditor must be held to have had reasonable cause to believe his debtor insolvent, and that the transfer was in fraud of the provisions of the bankrupt act. Any other view detracts greatly from the most wholesome operation of the law. Not paying debts in the usual and ordinary course of a trader's business from lack of present means and want of ability to raise means, must be regarded as *prima facie* evidence of insolvency, and the creditor who has knowledge of such facts must act in view of them. It is undoubtedly true that defendants and their agents and attorneys had no idea of the utterly insolvent and bankrupt condition of their debtors, as the proofs now show their debtors' condition to have in fact been. But we must not forget that there is a clear distinction between insolvency and bankruptcy. A trader may be insolvent and yet not be bankrupt.

There is one view of this case which settles the question we are discussing, and it is this: Tonkin & Trewartha were largely indebted, most of it past due, and they professedly wholly unable to meet that indebted-

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ness or any considerable part of it, in the usual course of business as those debts matured, and this was known to defendants. Tonkin & Trewartha were not only unable to pay as their debts matured, but confessedly unable to do so within a reasonable time, either from present means or through the aid of their credit and property, which solvent men are usually able to do.

They were not, in May, and for months before had not been, able to pay their debts past due. They were pressed from time to time for payment or security, and month after month continued to dishonor note after note as they matured. Their condition was such as to cause their pecuniary standing to be discussed by their creditors, and their over-due and unmatured paper to sell at fifty cents on the dollar.

This state of things betokens beyond any chance of mistake, not only that Tonkin & Trewartha were insolvent within the rule of not being able to pay their indebtedness as it became due, in the usual and ordinary course of their business, but, as all this was known to defendants, that they had reasonable cause to believe their debtors insolvent when the mortgage was made ; not that they *believed*, but had *reasonable cause* to believe. It follows, as a necessary inference, that a mortgage made under such circumstances was a fraud upon the provisions of the bankrupt act.

Having already found that the mortgage was made with a view to giving a preference, it follows that there must be a decree in favor of complainant for the value of the property taken by defendants.

I shall adopt the amount brought on sale as the fair value. This was ten thousand two hundred and seventy-six dollars, from which is to be deducted the mortgage lien on the property paid by defendants, one thousand eight hundred and twenty-five dollars, the remaining sum, with interest thereon to this date—one year and seven months—being nine hundred thirty-six

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dollars and sixty-four cents,—gives the amount of the decree, nine thousand three hundred and eighty-seven dollars and sixty-four cents.

Decree accordingly.

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District Court; Northern District of New York, February T., 1870

COLLISION.—INSCRUTABLE FAULT.—DAMAGES.

Where, in a collision case, the evidence is so conflicting or uncertain that the court cannot determine upon which vessel the real cause of the collision should be charged, the damages should be divided between the colliding vessels.

The rules and authorities governing the apportionment of damages for collision, in cases of mutual fault, inscrutable fault, and inevitable accident,—elaborately reviewed.

Hearing upon a libel for collision.

The libel in this case was filed by John V. Detlor and others, owners of The Silver Spray, against The Comet, The Lake and River Transportation Company, claimants; and came on for hearing upon the proofs.

The question which vessel was in fault for the collision, was closely contested. But as the decision proceeds upon the ground that the evidence did not enable the court to determine this question, and that the damages must be awarded upon the principle applicable to

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cases of inscrutable fault, that portion of the opinion which relates to the question of fault is omitted.

George B. Hibbard, for the libelant.

H. B. Brown and John Ganson, for the claimants.

N. K. HALL, J.—This is a cause of collision and damage, prosecuted by the owners of the side-wheel steamer *Silver Spray*, a Canadian vessel, against the propeller *Comet*, an American vessel, to recover the value of *The Silver Spray* and her cargo, which were sunk by a collision with *The Comet*, about ten o'clock in the evening of August 30, 1869, in Lake Huron, near the entrance into St. Clair river, at the foot of that lake.

The night was clear, and the weather fair; and there is nothing in the testimony tending to show that the collision occurred without culpable negligence or gross unskillfulness on the part of those in charge of at least one of the colliding vessels.

It was, therefore, necessarily conceded, upon the argument, that the case was not one of inevitable accident; but the testimony was in many respects conflicting and uncertain, and in some respects entirely irreconcilable; and it is not possible to determine, with absolute certainty, the particular fault or faults to which the collision should be attributed.

[The opinion here proceeds with a review of the evidence bearing upon the question—which vessel was to blame?]

Upon the whole evidence, it can hardly be doubted that there was gross and culpable negligence on both vessels, and the case will be disposed of as one of mutual fault—it being held that this may be properly done upon a clear and satisfactory preponderance of testimony, although it may be impossible to say that

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there is no reasonable doubt in regard to the specific and particular fault of each vessel, which was one of the proximate causes of the collision.

If, however, it is not a case of mutual fault, it is one in which, from the conflicting and unreliable character of the evidence, it is impossible to determine upon which vessel the real cause of the collision should be charged, and therefore a case of inscrutable fault. In either case, the damages must be divided between the colliding vessels. And such will be the final decree of this court in the present case.

As the conclusion that a libellant, in a collision case, is entitled to recover upon a clear and satisfactory preponderance of testimony, although there may be reasonable doubt as to which party is to blame, and the conclusion that in a case of inscrutable fault the damages must be equally borne by the colliding vessels, are directly opposed to a statement of the reporter's head-note to the case of *The Grace Girdler*, 7 *Wall.* 196, and as that head-note appears to be sustained by a *dictum* of Mr. Justice SWAYNE, whose character and learning are deservedly held in very high respect, it has been deemed proper to attempt to show that the head-note referred to was founded solely upon an *obiter dictum* of that learned justice, and not upon the decision of the court; and also to state the reasons which have induced a decision in opposition to the *dictum* referred to.

The statement of the head-note referred to is as follows: "Where, in a case of collision, with loss, there is reasonable doubt as to which party is to blame, the loss must be sustained by the one on which it has fallen."

A careful examination of the report of the case of *The Grace Girdler* will show that no such question was decided in that case; and that the only foundation for this statement of the reporter is a mere *dictum* of the

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learned justice just named, upon a question not discussed by him, and not involved in the decision of the court. Upon the full report, it is very clear that Mr. Justice SWAYNE and the majority of the court based their decision upon the conclusion that The Grace Girdler was free from fault, and that if the injured vessel was not in fault, it was a case of inevitable accident.

Mr. Justice SWAYNE states that the point that the injured vessel (the yacht Ariel) was in fault, was not pressed by the counsel representing The Grace Girdler ; and that, for the purposes of the case, they held that the yacht was blameless. It is true that he immediately adds : " But she suddenly thrust herself before the schooner (The Grace Girdler) and took the latter by surprise ;" and that he subsequently states that " the controlling fact, in the case under consideration, is the sudden change of the leading vessel (The Ariel) to a course across the bows of the one behind her." But these statements were not, apparently, deemed inconsistent with the position that the case was one of inevitable accident ; for, immediately afterwards, he proceeds to dispose of the question raised by the appellants under the seventeenth article of the act of 1864, " fixing rules and regulations for preventing collisions on water," and, in conclusion, states : " It would be a strange result if the statute should make an innocent vessel liable for an inevitable accident." After this, there is a short paragraph, stating what is required to entitle a libellant, in a collision case, to recover full indemnity ; and then the learned justice proceeds as follows, viz : " Inevitable accident is when a vessel is pursuing a lawful avocation, in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable, under the circumstances, such as is usual in similar cases, and has been found by long expe-

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rience to be sufficient to answer the end in view—the safety of life and property. When there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen.”

And near the conclusion of the opinion it is stated that the district court had acquitted The Grace Girdler, and dismissed the libel; that the circuit court had affirmed the decree, on appeal; that to warrant a reversal it must be clear that the lower courts had committed an error; and that the case was not one of that character.

From the foregoing statements, and indeed from the entire opinion of Mr. Justice SWAYNE, it is quite evident that the case was decided by the majority of the court as one of inevitable accident, and this is confirmed by the statement of Mr. Justice DAVIS, in his very brief dissenting opinion (which was concurred in by the CHIEF JUSTICE and Mr. Justice CLIFFORD), that he “could not agree that the collision was the result of inevitable accident.”

It is also confirmed by the fact that, so far as can be ascertained from the report, the question of the rule of damages in cases of inscrutable fault, had not been discussed by counsel, and that it does not appear that any of the American decisions or authorities bearing upon that question had been cited or discussed by the learned counsel who argued the case, or been considered by either of the judges of the court. Indeed, the only authority referred to in support of the *dictum* under consideration, is the case of *The Catharine of Dover*, 2 *Hagg.* 154, and the *dictum* itself seems to be only an incidental remark, rather than the deliberate expression of an authoritative judicial opinion. And certainly there is nothing in the opinion, or in the full report, to show that the point had been carefully considered by the learned judge or by his associates on the bench.

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This case of *The Catharine of Dover* (decided in 1828) is the first reported as having been decided by Sir CHRISTOPHER ROBINSON, after his appointment as the successor of Lord STOWELL. In submitting the case to the trinity masters, the new judge said: "The result of the evidence will be one of three alternatives: either a conviction in your mind that the loss was occasioned by accident" (meaning doubtless inevitable accident), "in which case it must be sustained by the party on whom it has fallen; or a state of reasonable doubt as to the preponderance of evidence, which will have nearly the same effect; or thirdly, a conviction that the party charged with being the cause of the accident is justly chargeable with the loss of the vessel, according to the rules of navigation which ought to have guided them." The trinity masters having declared their opinion that the loss was occasioned by accident, imputable chiefly to the improper movement of the *Dart* (the libelant's vessel), the learned judge declared that he adopted this opinion, "with perfect satisfaction," and dismissed the libel with costs. The question now under discussion did not, it is evident, arise in that case, nor was it at all discussed by counsel or by the court.

The subsequent case of *The Maid of Auckland*, decided by Dr. LUSHINGTON, in 1848, 6 *Notes of Cases*, 240, did, however, present the question of the rule of damages in cases of inscrutable fault, and though the question does not appear to have been discussed, either by the counsel or by the court. Dr. LUSHINGTON, in addressing the trinity masters, said, in substance, that in case they decided that they could not tell which vessel was to blame, the libel and cross libel filed in the case must both be dismissed.

The rule thus announced seems to have been adopted by the English admiralty, without controversy or discussion, and apparently without considering the difference between the common law rule, so adopted,

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and the rule of the maritime law, and whether the one or the other should be adopted in that court. Its adoption by the English admiralty has not been, and will not be held to be binding upon the American courts of admiralty; and though several of the district courts of the United States have adopted the rule of the maritime law, in exclusion of the common law rule, in such cases, the question is, it is supposed, still an open one in the supreme court of the United States.

Although the question had probably never been referred to in any opinion delivered in the supreme court of the United States, prior to the case of *The Grace Girdler*, the question was not then a new one in the admiralty courts of this country, and, as before stated, the rule of division of damages in cases of inscrutable fault had been approved by some of those courts. It had also been accepted as the established rule in this country by some of our most distinguished jurists.

Some of these authorities will be presently considered, but it may be well first to refer to the provisions of the judiciary act of 1789, and the process acts of 1789 and 1792, as bearing upon this subject; and also to the rule which prevails in the maritime courts of Europe.

By the judiciary act of 1789, original cognizance of all civil causes of admiralty and maritime jurisdiction was given to the district courts of the United States, saving to suitors, in all cases, the right of a common law remedy where the common law was competent to give it; and under this act it has been held that the jurisdiction of those courts embraces all cases of a maritime nature, whether they be particularly of admiralty cognizance or not; and that such jurisdiction, and the law regulating it, are to be sought for in the general maritime law of nations, and are not confined to that of England, or any other maritime nation. *Davis v. The Seneca*, *Gilp.* 10; *The Chusan*, 2 *Story C. Ct.* 456;

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Thompson v. The Catharine, 1 *Pet. Adm.* 104 ; The Friendship, 2 *Curt. C. Ct.* 426.

The temporary process act of 1789, provided that the forms and modes of proceeding in the courts of admiralty and maritime jurisdiction should be according to the course of the civil law ; and the process act of 1792, which is still in force, provides, in substance, that "the forms and modes of proceeding in suits of admiralty and maritime jurisdiction shall be according to the principles, rules, and usages which belong to courts of admiralty as distinguished from courts of common law," except so far as might have been, or might be otherwise provided by Congress or those courts.

Under these statutes, as well as from the character of the question, our courts of admiralty have naturally and properly looked to the admiralty and maritime courts, rather than to the courts of common law, for the rule of damages in collision cases ; and, consequently, the rule of the division of damages, in cases of mutual fault, has been firmly established by repeated decisions ; first, in the district courts, and more recently by decisions of the supreme court of the United States.

The rule of the division of damages, embracing the case of mutual fault, was recognized and sanctioned by the early maritime codes of Europe ; and in cases of mutual fault, it has been adopted by the admiralty courts of England and of this country, in direct opposition to the rule of the common law. But it was not to cases of mutual fault alone that this rule of division was applied by the maritime codes and maritime courts of continental Europe ; for the crude provisions of the ancient maritime codes required a division of the damages caused by a collision in the three cases of mutual fault, of inscrutable fault, and of inevitable accident. *Laws of Oleron*, art. 14 ; *Laws of Wisbuy*, arts. 26, 50,

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67, 70; *Pothier on Mar. Contr.* by Cushing, 91, 92, arts. 155, 156.

The provisions of the celebrated marine ordinance of Louis XIV. are, perhaps, somewhat more full, definite, and precise than those of the earlier maritime codes.

Articles 10 and 11 of title 7 of this ordinance, have been rendered into English, 2 *Pet. Adm.* App. 57, as follows:

“X. In case of ships running aboard each other, the damage shall be equally sustained by those that have suffered and done it, whether during the course, in a road, or in a harbor.”

“XI. But if the damage be occasioned by either of the masters, it shall be repaired by him.” And see 2 *Valin's Com.* 177-187.

The ancient rule of the division of damages, and which applied equally to the cases of mutual fault, inscrutable fault, and inevitable accident, was doubtless originally adopted because of the difficulty of determining to which vessel the fault which caused the loss should be imputed. Thus *Grotius*, book 2, ch. 17, art. 21, in speaking of a master's liability for damage caused by his slave or beast, says:

“For the master that is not in fault, is not bound to make reparation by the law of nature; no more than he whose ship, without his fault, falls foul upon his neighbor's ship and damages it. Although by the laws of many nations, as by our own, such damages are to be equally divided between them both, by reason of the difficulty of proving the fault.” And for a similar reason, the civil law made the several occupants of different parts of a house liable for damages in certain cases without proof of personal fault, unless it could be proved to whom the cause of such damages should be imputed.” *Domat*, part I., book 2, tit. 8, § 1, art. 5.

It is true that the rule which requires a division of

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damages in collision cases has been much discussed, and sometimes disapproved by elementary writers and learned judges ; but it has nevertheless been generally accepted as the rule in common use by the maritime courts of this country and of the European continent, and by the most eminent writers on maritime law. It has had the sanction of Cleirac, Valin, Grotius, Emerigon, Pardessus, and Boulay-Paty, and of Kent and Story, as well as that of the judges of the maritime courts. It has been considered as firmly established in the cases of mutual fault and of inscrutable fault ; whilst in this country and in France, as well as in England, the civil law rule (which in this respect corresponds with that of the common law), that in the case of inevitable accident the damage must be borne by the party on whom it has fallen, has, in those cases, displaced the rule of division adopted by the ancient maritime codes.

The *Code de Commerce*, art. 407, contains the following provisions : " In case of running foul, if the occurrence was purely accidental, the damage is borne, without remedy, by the suffering vessel. If the running foul proceeded from the fault of one of the captains, the damage is paid by the one who occasioned it. If there be a doubt which of the two vessels was in fault in running foul, the damage is to be repaired at their common expense, in equal portions between them." *Code de Commerce*, with translation by Rodman, 1814, 232, 233. The original of so much as relates to the question now under discussion, is as follows : " S'il y a doute dans les causes de l'abordage, le dommage est réparé à frais communs, et par égale portion par les navires qui l'ont fait et souffert." *Bacquet's Codes*, new edition, published by Durand, in Paris, 1856.

As has been said, the ordinance of Louis XIV. made no distinction between the cases of mutual fault, of inscrutable fault, and of inevitable accident ; and the

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Code de Commerce, while it specially adopts the rule of the civil law, and of the common law, in the case of inevitable accident, makes no express provision for the case of mutual fault. EMERIGON (*Emerigon on Ins.* Meredith's ed. 327) apparently ignores the existence of cases of mutual fault. He says: "There are three kinds of collision—that which happens from casualty; that which happens by the fault of some one; and that which happens without it being possible to ascertain by whose fault." He further says, p. 328, that in the first of these cases, "each vessel puts up with the injury it has received;" that, in the second case, p. 329, "the damage shall be made good by the party who caused it." In respect to the third case, he says, pp. 332, 333: "If the collision has not happened from casualty, though it is impossible to know by whose fault, it is then a case for dividing the disaster, and making each of the vessels bear one-half of the damage. Such is the sense of article 10 of the ordinance of Louis XIV. 'In case of collision of vessels, the damage shall be paid for equally by the vessels which have done and suffered it, whether on the voyage, or in a roadstead or port.'"

"Stypmanus, Kuricke, and Loccenius, say that this division of the loss is prescribed by equity, and on the account of the difficulty of proof. Cleirac appears to confine it to the case where the party doing and the party suffering the damage are to blame, and their excuses are very obscure. Grotius says that, as it is difficult to prove the fault, even when it has been willful, the laws of some countries direct that in the case in question the masters of the two vessels shall bear each an equal portion of the damage. Many cases are found in our books where this division of loss has been decreed on account of the difficulty of the question." And see *Arnold on Ins.* Perkins' ed. 805.

*It may be proper to observe that the quotation from

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Grotius, made by Emerigon, as above stated, is a different translation of a part of section 21, liber 2, ch. 17, which has been hereinbefore referred to in another translation.

LORD TENTERDEN says, *Abb. on Shipp.* 229: "By the law of most of the maritime states, differing in this particular from the Roman law, which leaves each party to bear his own loss, the cost of damage resulting from collision without fault in the persons belonging to either ship, is to be divided equally between them. The same rule obtains when both vessels are to blame, and when the blame cannot be detected."

The division of damages in cases of mutual fault has been more seriously controverted than the rule which requires such division in cases of inscrutable fault; and so late as 1837, a learned and able writer on mercantile law, in the *London Law Magazine*, in questioning the rule in cases of mutual fault, ventured to declare that no writer on maritime law applied the rule of equal partition to any case but that of inscrutable fault. *Note to Curtis' Adm. Dig.* 145, and *17 Law Mag.* 327.*

* In the head-note to the case of *Mary Stewart*, decided in 1844, 2 *Wm. Rob.* 244, it is stated that "in cases of collision, where the evidence on both sides is conflicting and nicely balanced, the court will be guided by the probabilities of the respective cases which are set up, &c." And see *The Speed*, *Id.* 225.

Again, in *The Wheatsheaf v. The Intrepide*, *Holt's Rule of the Road*, 210, 212, 213, Dr. LUSHINGTON, in addressing the trinity masters, said: "I am exposed to great difficulty from the extreme contradiction in the evidence in the case;" . . . and "you must consider from the evidence the probabilities on the one side and on the other." And there was a decree for the libelants. And see *The Jane & Ellen v. The Emma*, *Id.* 207; *The Saucy Lass v. The Boldera*, *Id.* 205; *The Esther v. The Concordia*, *Id.* 142; *The Benedetto v. The Calypso*, *Id.* 117. In the case of *The Emperor v. The Zephyr*, *Id.* 24, it was said by the court that the evidence was so conflicting that it was impossible to reconcile it, and that in cases of that description they must be governed by the probabilities.

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And in 1848, in the case of *Wells v. The Bay State*, 6 *N. Y. Leg. Obs.* 198, Judge BETTS, of the southern district of New York, after stating that it was the first case which had occurred in that district in which the question had arisen, and after declaring himself better satisfied with the common law rule, adopted the rule of division in a case of mutual fault as having been sanctioned by Judges WARE and HOPKINSON, and impliedly admitted by the supreme court of the United States in *Strout v. Foster*, 1 *How.* 92 ; but adding, that the principle deserved the solemn adjudication of our highest tribunals.

The American authorities, with scarcely an exception, affirm the rule of equal division in cases of inscrutable fault.

In 1847, in the case of *The Scioto, Davies*, 359, one of the most learned, as well as one of the most careful of our admiralty judges,—Judge WARE, of the Maine district,—sanctioned the rule in a very carefully prepared and able opinion ; and in 1854, in the case of *The Nautilus, Ware*, 2 ed. 529, the same learned judge again applied the rule of division in a case of inscrutable fault. And, also in 1854, the learned judge of the Ohio district, in the case of *Lucas v. The S. B. Swan*, 6 *McLean*, 282 ; S. C., *Newb.* 158, unhesitatingly applied the rule of division in a case held to be one of inscrutable fault. In *Jarvis v. The State of Maine*, in the southern district of New York, in 1857, 36 *Hunt's Mer. Mag.* 326, the same rule was adopted under like circumstances. The rule has been acted upon in other districts, in like cases, and it is believed that in all such cases the decisions upon that question have been submitted to without appeal.

The American writers on maritime law, it is believed, without exception, accept the rule of division of damages in cases of inscrutable fault. *Story Bailm.* §§ 608, 609, and notes ; 3 *Kent Com.* 231 ; 1 *Pars.*

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Merc. L. 1 ed. 188; 1 *Conk. Adm.* 2 ed. 378, &c.; *Bouv. Law Dic.* tit. Collision; *Flanders Mar. L.* §§ 357, 358.

It is deemed proper also to refer again to the particular language of the *dictum* of Mr. Justice SWAYNE, not for the purpose of verbal criticism, but as furnishing additional evidence that it was a hasty and inconsiderate expression, not based upon any well considered or deliberate opinion of that learned judge.

In a case of collision, the term *reasonable doubt*, may, perhaps, have a somewhat different signification from that given to it upon a criminal trial; but lawyers and judges accustomed to the trial of collision cases (in which, perhaps, more than in any other class of cases, the testimony is very often so conflicting and irreconcilable, that there must be reasonable doubt which party was to blame), will at once admit that if these cases are not to be decided, like other civil cases, upon the clear preponderance of testimony, the majority of those who suffer damage by collision, occasioned by negligence, will find that a remedy is often denied them when it would have been afforded by the admiralty courts under precisely the same circumstances if the new rule had not been adopted.

As further additional evidence of the same character, it may be observed that the *dictum* of Mr. Justice SWAYNE is not justified by the *dictum* of Sir CHRISTOPHER ROBINSON, cited in its support. "A state of reasonable doubt as to the preponderance of evidence" in a collision case, is a very different thing from a "reasonable doubt as to which party is to blame;" for in many cases a very clear and decided preponderance of testimony may exist, and the judicial mind yet be subject to reasonable doubt as to which party was to blame.

For these reasons the *dictum* referred to has not been considered as binding upon this court, and its

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final decree in this case will provide for a division of the damages.

Decree accordingly.

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*Circuit Court, Fifth Circuit ; District of Louisiana,
April 7, 1870.*

COMMON CARRIERS.—LIABILITY OF STEAM-TUGS.

The owners of a steam-tug or tow-boat, engaged in the business of towing vessels from point to point, but not receiving the vessels or the property on board of them into their care or custody otherwise than is involved in the mere act of towage, are not liable as common carriers in respect of such employment. To charge them for an injury to the tow, such injury must be shown to have resulted from some neglect or fault in the management of the tug.

Appeal from a decree of the district court.

N. H. Armstrong, for libelants.

Carleton Hunt, for claimants.

Woods, J.—The case was this : On May 28, 1866, the steam-tug Neaffie undertook to tow a flat or barge laden with hay from Jefferson city to the flat-boat wharf in the city of New Orleans—a distance of three or four miles. She made fast to the flat and towed her

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down the stream to said wharf, the master and crew of the flat remaining aboard of her. As she was about landing the flat, the latter collided with another flat made fast to the wharf. In a short time after the collision, the flat towed by The Neaffie sunk. The damage sustained by the sinking of the flat is agreed to be thirty-one hundred and fifty dollars.

The libelants charge that the sinking of the flat was in consequence of the collision, and that the collision was brought about by the carelessness of Cook, the master of The Neaffie ; and in argument they allege that The Neaffie was a common carrier, and responsible for all damages to the flat not occasioned by the act of God or the public enemy.

The claimants answer, that when The Neaffie approached the flat for the purpose of towing down to the flat-boat wharf, they found her in a leaky condition, and refused to take her in tow except at the risk of her owners, to which the captain and part-owner of the flat assented. They deny any carelessness on the part of the master of The Neaffie, and deny that there was any collision whereby the flat was damaged ; or that the sinking of the flat was the consequence of any damage received by her collision with the other flat lying at the wharf. They allege that the slight impingement of the one flat against the other was caused by a sudden eddy or boil in that part of the river.

In the view I have taken of this case, these are the only facts alleged on either side which it is necessary to recite.

The naked fact that the flat of the libelants, while in tow of The Neaffie, did impinge upon the flat made fast to the wharf, and that in a very short time thereafter she sunk, raises a presumption of mismanagement and negligence on the part of the captain of the steam-tug, and fixes a liability for damages sustained upon her owners, unless contrary proof is adduced showing or-

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dinary care and diligence. I have searched the testimony in this case in vain to find any act of carelessness or negligence on the part of the captain of The Neaffie. On the contrary, the proof shows, to state the result in the mildest form, reasonable care and diligence. No witness speaks of any act done or omitted showing want of skill or care on the part of The Neaffie.

Under this state of facts The Neaffie cannot be held liable for the damage suffered by the flat and cargo, unless she is made responsible as a common carrier.

The business of The Neaffie, as the evidence shows, is to tow flats and other water craft from one point to another in and about the harbor of the city of New Orleans. The hire for her services varies according to the bargain made at the time the service is rendered.

A common carrier is often defined to be : "One who undertakes for hire to transport the goods of such as choose to employ him from point to point."

This definition is very broad, and in its application to facts is subject to certain limitations. A better and more precise definition is, "One who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage."

Was The Neaffie a common carrier under either of these definitions ?

Chief Justice MARSHALL, in *Boyce v. Anderson*, 2 *Pet.* 150, says : "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further or applied to new cases." So unless the case of steam-tugs towing boats and their cargoes can be brought strictly within the definition of common carriers, I am not disposed to apply to them the great rigor of the law applicable to common carriers.

The Neaffle.

Can it be said that the tug-boats plying in the harbor of New Orleans undertake to transport the goods found on the water craft which they take in tow ? It appears to me that it is the boat in which the goods are put that undertakes to transport them. The tug only furnishes the motive power. It is like the case of the owner of a wagon laden with merchandise hiring another to hitch his horses to the wagon to draw it from one point to another, the owner of the wagon riding in it, and having charge of the goods. In such a case, could it be claimed with any show of reason that the owner of the team was a common carrier ? The reason of the law which imposes upon the common carrier such rigorous responsibility fails in such a case.

The tug-boats plying in New Orleans harbor do not receive the property into their custody, nor do they exercise any control over it other than such as results from the towing of the boat in which it is laden. They neither employ the master and hands of the boat towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The boat, goods, and other property remain in charge and care of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the master or crew of the tow-boat, it can be hardly contended they would be answerable, and yet carriers would be answerable for such loss.

That tow-boats are not common carriers has been held in the following cases : *Caton v. Rumney*, 13 *Wend.* 387 ; *Alexander v. Green*, 3 *Hill*, 1 ; *Wells v. Steam Navigation Company*, 2 *Comst.* 204 ; *Pennsylvania, Delaware & Maryland Navigation Company v. Dandridge*, 8 *Gill & J.* 248 ; *Leonard v. Hendrickson*, 18 *Penn. St.* 40.

In *Vanderslice v. The Superior*, Mr. Justice KANE held a steam tow-boat liable as a common carrier ;

The Neaffie.

but when the case came before the circuit court, Mr. Justice GRIER said he could not assent to the doctrine.

I am aware that a contrary doctrine has been applied by the supreme court of Louisiana to steam-tugs towing between the city of New Orleans and the mouth of the Mississippi river. These tow-boats are distinguishable from those plying in the harbor of New Orleans; but if it were otherwise, I think the weight of authority and reason is with those who hold tow-boats not to be common carriers.

Holding, then, that The Neaffie was not a common carrier, and that she was bound only for ordinary diligence and care, and that the testimony shows such diligence and care on the part of the master of The Neaffie, it follows that the libel must be dismissed at the costs of libelant.

The cross libel of claimants, not being supported by any proof, is also dismissed.

Libels dismissed.

UNITED STATES v. SIMONS.

*District Court; Western District of Pennsylvania,
June 7., 1870.*

INTERNAL REVENUE.—“PRODUCE BROKER.”

One whose occupation is to sell agricultural produce in public market, is not exempted from the tax imposed by the internal revenue law of 1866 upon “produce brokers,” by the fact that the produce sold is not purchased by him for sale, nor sold as agent for another, but is raised by himself upon his farm.

Trial of an indictment.

The defendant, Charles Simons, was indicted for carrying on business as a produce broker, without paying the special tax required by the internal revenue laws.

The evidence upon the trial showed that the defendant owned a piece of land in the vicinity of the city of Williamsport, on which he raised vegetables; and he was accustomed to dispose of these vegetables on the regular market days, in the markets of the city.

H. B. Swope, District-Attorney, for the government, contended that there were only two ways in which the defendant could dispose of his produce without paying tax—one by selling it at the place of production, and the other by hawking it in the manner of a pedlar; and that when he entered the market place regularly and competed with other dealers who were compelled to pay tax, he made himself equally liable.

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Allen & Bartles, for the defendant, contended that the defendant had the right to dispose of produce raised by himself, on his own land, without payment of any tax.

MCCANDLESS, J.—The courts of the United States are tribunals which were created by the constitution to stand between the government and the people. Whilst we see that the laws are enforced, we must take care that the citizen is not oppressed. The decisions of the several departments at Washington are entitled to great respect, but they can not and do not control the judgment of our courts. Otherwise we would not be, as we are designed to be, an independent branch of the government, wholly irresponsible for the soundness of our decrees, to either Congress or the executive. In this matter of taxation, which has annoyed the world from the days of the tribute to, and the image and superscription of Cæsar, and which is always a source of discontent, in protecting the people we must preserve the faith of the nation. To re-establish the Union and place it upon a permanent basis, we have contracted a large public debt, the principal and interest of which must be paid to the uttermost farthing. Anything else would be derogatory to our personal integrity, and disgrace us in the face of all nations. Every citizen, therefore, is bound to contribute to the common fund, and his omission or refusal to do so inflicts an injury upon his fellow citizens, and upon the government to which he is indebted for the protection of his life, liberty, and property.

Before announcing the conclusion at which I have arrived, I have thought it proper to make these preliminary observations, because there is a large class of people who think they are or should be exempt from the onerous burden which is laid upon us all.

Simons is indicted for carrying on the business of a

produce broker without having paid the special tax. Nothing criminal, in the ordinary sense of the term, is attributed to him. The proceeding against him is designed as a test case to ascertain whether, in the exercise of his occupation as a market gardener, he is liable to its payment.

We think he is. The evidence shows that he is the owner of forty acres of ground on Lycoming creek, in the vicinity of this city, which he cultivates in raising vegetables; that, except in December and January, he attends the market of Williamsport with his horses and wagon, backs up at the curbstone at different points on Market and Third-streets, erects a temporary stand at the tail of his wagon, and there, twice a week, on the days fixed by an ordinance of the city as market days, sells the products of his garden.

It has been contended, with much ability, that he does not come within the category of produce broker. At one time in the consideration of this case I was inclined to concur with the learned counsel for the defense, and designed to request a further argument from the able district-attorney, but am now clear that the defense is not tenable.

If the question depended upon the common acceptance of the word "broker," the argument for the defendant would be sound, for a broker is a middle man, an intervenor between the buyer and seller, a factor or agent who contracts for the one or the other.

We have exchange brokers, stock brokers, pawn-brokers, and insurance brokers, who negotiate between vendor and vendee; and as Simon sells his own products, he could not very well be called a broker. But Congress has not left it to the courts to define what the word broker means. They have given us a legislative definition by which we are bound.

In section 79 of the act of 1866, they say that a "produce broker" is a person "whose occupation it is

to buy or *sell* agricultural or farm products." If he buys or *sells*, whether he does it for himself or for another, he is to be "regarded," in the language of the act, as a "produce broker." Congress might have used a better term, but all refinement upon the words is at an end in the face of this definition. It was doubtless the design to exempt, as far as practicable, the agricultural portion of the community from burdensome taxation; but as almost every person and everything is necessarily subject to taxation, there was no good reason why the producer, who brings his articles to market and comes in competition with merchants, or those who only buy and sell, should be so highly favored. If he sells from his farm or his garden he pays nothing, but if he acts in the capacity of a merchant or dealer, he must pay a tax upon that occupation. That is but just to his fellow tax-payers, and he ought not to complain of the government which exacts it.

But there is still another reason why I consider this the true construction of the statute. Farmers and gardeners are exempt from taxation as pedlars; that is, they may go from house to house in town or country and sell their produce without paying a special tax. They are also exempt as "manufacturers or producers." Here the maxim "*expressio unius est exclusio alterius*" applies. If Congress intended that they should not be included in the class of produce brokers they would have said so. If they pursue any other occupation than that of tilling the soil, and selling directly from their farms or gardens, they incur the liability of the additional employment, and I think properly so.

All this is a case of the first impression, no published opinion of my brethren of the bench having yet appeared; as it involves large interests to both the government and the people, I have given to it careful

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consideration, and the more I reflect upon it the better I am satisfied the decision is right.

Your verdict should be against the defendant.

The jury immediately returned a verdict of "guilty in manner and form, &c. &c.," whereupon the defendant was sentenced to pay a fine of ten dollars, the special tax for two years, twenty dollars, and the costs.

CARROLL v. WATKINS.

*District Court; Southern District of Mississippi,
May T., 1870.*

LIEN OF JUDGMENT.—EFFECT OF STATE STATUTES.

The effect of a judgment of a United States court, as a lien upon the lands of defendant, cannot be restricted by State statutes, or by the construction placed by the State courts upon such statutes.

A State statute requiring judgments to be enrolled in the county in which the lands to be affected lie, before they can become liens on real property, has no effect upon the lien of a judgment of a court of the United States. Such judgment becomes a lien on lands throughout the district in which it is recovered.

Hearing upon a bill in equity.

This bill was filed by Messrs. Carroll & Hay against Watkins, as assignee in bankruptcy of J. B. Moore, and others, to enforce their claim to priority of payment out of the assets in the assignee's hands. Carroll & Hay were commission merchants in New Orleans,

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and obtained judgment in the circuit court of the United States, sitting in the southern district of Mississippi, against Moore, who was formerly in business as a retail merchant. This judgment was never enrolled in the county in which Moore resided, and in which the property involved in this litigation was situated.

After the rendition of this judgment, other creditors of Moore obtained judgments against him in the State court holden within Scott county, the county where Moore's residence and property was ; and these judgments were duly enrolled pursuant to a law of the State prescribing that no judgment shall be a lien on lands unless enrolled in the county in which they lie.

Soon after these judgments were perfected, Moore filed his petition in bankruptcy, and was declared a bankrupt. The defendant Watkins was appointed his assignee. Lands of Moore lying in Scott county were surrendered to him, and were sold by him under a decree of the district court in bankruptcy.

Carroll & Hay then filed this bill or petition against the defendant Watkins, originally, claiming priority in payment out of the proceeds of the lands, on the ground that the judgment of the United States circuit court in their favor was a lien upon the lands in question. By agreement of parties, the other creditors, upon judgments recovered in the State court, applied to be and were admitted defendants. They claimed that the judgment in favor of Carroll & Hay never became a lien, because it was never enrolled in the county ; and that their judgments, which were so enrolled, were liens, and were entitled to priority of payment, although junior in date.

William Yerger, for the complainants.

A. Y. Harper, for the rival creditors.

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HILL, J.—This is a bill filed by the complainants against Watkins, assignee of Moore, praying that the lands surrendered by Moore shall be sold, and the proceeds applied to the payment of their judgment against Moore, recovered in the circuit court of the United States for said district. The other defendants filed their petitions, praying to be made parties to this cause; and that said lands be sold and the proceeds applied to the payment of their judgments, obtained in the circuit court of this State for the county of Scott. The judgment of complainants was obtained prior to those of the defendants—the creditors in the judgments in Scott circuit court—but was not enrolled in the county of Scott, where the land is situated. The judgments in the Scott circuit court were duly enrolled in said county before Moore filed his petition to be declared a bankrupt.

The only question presented for decision is, whether or not the judgment of complainants, not being enrolled, constituted a lien on the lands described in the pleadings; if so, their judgment, being prior in date, must first be satisfied; and the residue, if any, applied to the payment of the judgments obtained in the Scott circuit court.

This is one of those vexed questions which occasionally arise between the national and State tribunals, and in which each claims the enforcement of rights emanating under the constitution and laws of the power of its own creation. In this State this conflict commenced with the case of *Tarpley v. Hamer*, 9 *Sm. & M.* 310, and continued by the case of *Bonafée v. Fisk*, 13 *Id.* 589; and *Brown v. Deacon*, 27 *Miss.* 682; and in the supreme court of the United States, in the case of *Massengill v. Downs*, 7 *How.* 760.

Were it conceded that the lien of judgments rendered in the Federal courts depends upon the legislation of the State, or the construction given to it by the

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courts of the State, the controversy would be at an end. The judgment of complainants would have no effect as a lien upon the lands of the bankrupt, there being no evidence that an execution was ever issued and placed in the hands of the marshal to be levied. For in addition to the repeated decisions of the high court of errors and appeals of the State, the legislature, by the provisions of the code of 1857, p. 525, art. 262, declare in express terms, that no judgment or decree rendered in any court of the United States, shall be a lien upon, or bind any property of the defendants situated out of the county in which said judgment or decree is rendered, until the plaintiff shall file in the office of the clerk of the circuit court of the county in which the property may be situated, an abstract of such judgment or decree, certified by the clerk of the court in which the same was rendered, containing the names of the parties to such judgment or decree, its amount, and the amount appearing to have been paid, if any, &c.

Then in article 263 of the same chapter, and on the same page, it is further provided that no judgment or decree rendered in any court of the United States shall be a lien upon or bind the property of the defendants in the county in which the judgment is rendered, unless the abstract of the judgment is filed and enrolled as provided in article 262. Thus it is seen that so far as the legislative will of the State and the judicial mind of the highest tribunal of the State can settle the question, it has been unmistakably done.

The same result would follow if this question were to be governed by section 34 of the judiciary act of 1789, which provides that "the laws of the several States, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

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Having given the statutes and decisions of the courts of the State on this question, the next point of inquiry is to ascertain what is the law of the United States on this question, as settled by the courts thereof.

The only case decided by the supreme court of the United States, arising in this State, is the case of *Masingill v. Downs*, 7 *How.* 760. In that case the judgment claimed as a lien was obtained in the circuit court of the United States for the southern district, on the first Monday in November, 1839, before the passage of the abstract act, as it was called, of 1841. This act restricted the judgment liens to cases in which an abstract of the judgment should be filed in the office of the clerk of the circuit court of the county in which the property was situated, and making its provisions apply to all cases in which judgments had already been rendered, unless the abstract should be filed on or before July 1, 1841. The main question decided was, did that act destroy or make void the lien created by the judgment rendered before its passage? The court held that it did not. The judge, in delivering the opinion of the court, states that the lien, if not an effect of the judgment, was inseparably connected with it, whether the lien was created by the execution and judgment or the statute; and in either case where the right has attached in the courts of the United States, a State has no power, by legislation or otherwise, to modify or impair it. It is true that Justice McLEAN, in delivering the opinion of the court, does say "that the point certified does not require us to consider whether the law can operate on a judgment being entered subsequent to its date;" but the whole reasoning given in the opinion goes to show that, had the question arisen on a subsequent judgment, the result would have been the same. The judgment lien in that case was held to grow out of the process act of 1828, that that act was not controlled

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by section 34 of the judiciary act of 1789. The process act of 1828 remains unchanged in the southern district of Mississippi. There has been no act of Congress changing it, nor has there been any rule of court changing or in any way modifying it. The act of the legislature of this State, passed in 1834, making all judgments liens from their rendition, was in force when the process act of 1828 was passed by Congress.

The opinion of the court further states "that the circuit courts of the United States exercise jurisdiction co-extensive with their respective districts, and it has never been supposed that by the process act of May 19, 1828,—which adopted the process and modes of proceeding in the State courts,—the jurisdiction of the circuit courts was restricted. The process and modes of proceeding in the State courts were adopted by Congress in reference to the jurisdiction of the circuit courts, and not with the view of limiting those courts."

In those States where the judgment or the execution of a State court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process, or by express statute. Any other construction would materially affect, and, in some degree, subvert the judicial power of the Union. It would place suitors in the State courts in a much better condition than those in the Federal courts. That the decisions of the supreme court of the United States give to judgments rendered in the Federal courts a lien upon the property of the defendant whenever situated in the district in this State without enrollment, is admitted, in the opinion of the court, in the case of

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Brown v. Bacon, 27 *Miss.* 589. That the State legislature can pass no law binding on the courts of the United States, or giving effect to, or changing the judgments or decrees rendered therein, was distinctly settled by the supreme court of the United States as early as 1825. In the very able opinion of Chief Justice MARSHAL, in the case of *Wayman v. Southard*, 10 *Wheat.* 1, the chief justice, in delivering the opinion of the court, uses this strong and pointed language: "That it has not an independent existence in the State legislature is, we think, one of those political axioms, an attempt to demonstrate which would be a waste of argument not to be excused." The proposition has not been advanced by counsel in this case, and will probably never be advanced. Its utter inadmissibility will at once be presented to the mind, if we imagine an act of the State legislature for the direct and sole purpose of regulating proceedings in the courts of the Union, or of their officers, in executing their judgments. *No gentleman*, we believe, will be so extravagant as to maintain the efficiency of such an act. It seems not much less extravagant to maintain that the practice of the Federal courts and the conduct of their officers, can be indirectly regulated by State legislatures by an act professing to regulate the proceedings of the State courts, and the conduct of the officers who execute the process of those courts. It is a general rule that what cannot be done directly from defect of power, cannot be done indirectly."

In the case of *Bank of the United States v. Holstead*, 10 *Wheat.* 51, it is held that the act of the assembly of Kentucky, which prohibits the sale of property taken under executions, for less than three-fourths its appraised value, without the consent of the owner, does not apply to a *venditioni exponas* issued out of the circuit court of the United States for Kentucky. The question again came before the supreme

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court in 1862, in the case of *Wood v. Chamberlain*, 2 *Black*, 430, in which it is held that, under the process act of 1828, a decree of the district court of the United States, sitting in admiralty in the State of Ohio, is a lien upon the lands of the defendants. Justice CLIFFORD, in delivering the opinion of the court, gives the following as the settled rules of that court: "That the States have no authority to control or regulate the proceedings in the courts of the United States, except so far as the State process acts are adopted by Congress, or by the courts of the United States, under the authority of Congress."

Other decisions made by the supreme court of the United States, bearing upon the question, might be cited, but it would extend this opinion to too great a length.

Almost the identical questions now presented came before the United circuit court for the district of Indiana, at the May term, 1840. In that case the judgment, which was the foundation of the plaintiff's action of ejectment, was obtained at December term, 1827, of said court; no copy of the judgment was filed with the clerk of the county in which the real estate was situated, as required by the laws of Indiana. The defendant claimed title, under the sheriff's deed, upon a junior judgment in the State court of the county in which the real estate was situated, which, it was admitted, was a lien only as against plaintiff's title from the marshal under his judgment. Justice McLEAN, in delivering the opinion of the court, held that, by force of the process act of 1828, a lien was created by the defendant's judgment, without any statute directly conferring it. That the act of 1831, of that State, limiting the liens of judgments to those rendered in the county in which the judgment was rendered, or in which a copy of the judgment was filed, could not annul or impair the lien created by the plaintiff's judgment, under

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and by force of the process act of 1828, and that the jurisdiction of the Federal courts is co-extensive with the limits of the State of Indiana, and consequently the liens of its judgments extend throughout the State. From a careful examination of the decisions of the courts of the United States, I am satisfied that the holding is, that judgments or decrees rendered in the courts of the United States become liens on the property of the defendant situated in the district in which the judgment or decree is rendered, subject only to prior liens thereon, from the date of the rendition, without reference to any law of the State not adopted by Congress, or the courts of the United States, under Congressional authority.

I am further satisfied that such ruling is correct, upon principle, and whether satisfied of the correctness of the principle, or not, it being so settled by the supreme court of the United States, it is my duty to adopt it; and, so holding, must declare the complainants entitled to a prior lien on the lands stated in the bill, which will be sold as other lands under the rules of this court in like cases, and the proceeds, so far as necessary, applied, first, to the payment of complainant's judgment; and then, if any surplus shall remain, to the judgments obtained in the circuit courts of Scott county in their order of priority.

Decree accordingly.

United States v. Learned.

UNITED STATES v. LEARNED.

*District Court; Eastern District of Michigan,
March T., 1870.*

STAMPS.—CRIMINAL PROSECUTION.

An instrument in the following form,—“Due the bearer or” [naming a payee] ——— “dollars in merchandise out of our store,” signed on behalf of an employer, by his bookkeeper, under his general instructions, and delivered to a person employed to enable him or any one to whom he may transfer it to obtain the goods, in payment for services rendered, is a contract, and requires a five-cent stamp.

Upon trial of an indictment for issuing instruments without stamping them as required by law, proof of issuing an instrument unstamped which by law should have been stamped, is sufficient, in the first instance, to warrant a conviction. The jury are to presume that the defendant knew the requirements of the law and intended to evade it, in the absence of some explanation from him.

Motion to set aside a verdict of guilty and for a new trial.

Charles G. Learned and Frederick S. Ayres were brought to trial upon an indictment for issuing an unstamped agreement. Under the instructions given, the jury found a verdict of guilty.

The defendants now moved to set aside the verdict, and for a new trial, on the ground of refusal to give certain charges to the jury, and of misdirection in the charges which were given.

On the trial, it appeared that the defendants had been for years extensive manufacturers of lumber at Port Austin, in the district, and that in the prosecution

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of their business they employed a large number of men. They also dealt in merchandise. They employed a bookkeeper for their general business, and clerks in their store. The books were kept at the store.

From about the time of their starting in business, dating back to a period anterior to the passage of the first internal revenue law, they had been in the practice of issuing to their men due bills, payable in merchandise out of their store, in the following form :

“No. 1550. PORT AUSTIN, MICH., Oct. 28, 1868.

“Due the bearer, or J. L. Coy, Seven Dollars, in merchandise out of our Store.

“(Signed) AYERS, LEONARD & WISWALL.
“VAN WART.”

(The above is an exact copy of the instrument upon which the prosecution in this case was founded.)

These due bills were issued by the bookkeeper, but never in excess of the amount appearing to be due, and in all cases were charged to the men in their accounts as so much money.

Large numbers of them were so issued. One of the clerks testified that he thought as many as four thousand, during the year 1868. In some instances, the men, or members of their families, would come to the store of defendants and select what goods they wanted to purchase, and then one of the clerks in the store would go to the bookkeeper and get one of these due bills for the amount of goods selected,—the due bill being charged to the man by the bookkeeper, and retained by the clerk as his voucher for the goods thus disposed of—thus operating as a check upon the men, against their getting goods at the store, at any time, to a greater amount than what was due them from the defendants. About one-fourth of all the due bills issued were issued and used in this manner. The other

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three-fourths were issued directly to the men and taken away by them, and either sold to others, or traded out afterwards by themselves or their families as they might need the goods.

They were issued in small amounts, and were often used by the men for other purposes than that of getting goods at defendants' store. They disposed of them sometimes to farmers for produce, and sometimes to other merchants for goods. One merchant doing business some eight miles distant testified that he had seven hundred dollars of them at one time. They were so issued and used with the full knowledge and acquiescence of the defendants, and by their authority and direction.

These due bills, including the one in question, were so issued unstamped, and, on the trial, it was conceded by the defendants that they were so issued, with their knowledge and intention.

There was no direct evidence, and in fact no evidence at all, except what may be guessed at or inferred from the circumstances surrounding the transactions, explaining or tending to explain why stamps were so omitted. Reasons and excuses for omitting to stamp were offered by counsel, by way of argument, as will hereinafter appear, but none whatever in the proofs.

Upon this state of facts the court charged the jury, among other things, substantially as follows :

1. That, by the law of the land, the instrument in question is a contract.
2. And that as such, an adhesive stamp of five cents was required by the internal revenue law.
3. That the defendants are presumed to know the law.
4. That the omission of a stamp was an evasion of the law, and unless explained, it must be presumed that the defendants so intended.

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The defendants' counsel requested the court to charge the jury, among other things, as follows :

"2. That if the defendants made the paper in this case, intending it only as a voucher to the clerks in the store that Coy's account was good for seven dollars, then the defendants are not liable."

Which request the court granted, with this qualification ; insert after the word dollars, in next to last line, the following : "And if it got afloat without their knowledge or intention."

And in this connection, the court further charged the jury that if the paper in question was actually used as a matter of convenience merely between the bookkeeper and the clerks in the store, and did not go into the hands of Coy or other persons, then it never became an agreement or contract for want of delivery, and no stamp was required. But, whether it was originally intended for such matter of convenience merely, or not, if it went into Coy's hands, or otherwise got afloat, by the authority, intent, or acquiescence of the defendants, then it did become such agreement, and did require a stamp.

Defendants' counsel further requested the court to charge :

"3. That if the defendants did not understand or believe that the paper in this case was a contract, but supposed it was only a voucher, then the defendants are not liable."

Which request the court refused.

The reasons assigned in support of the motion to set aside the verdict, and for a new trial, were the following :

"Because the court refused to instruct the jury as requested in defendants' second and third requests ; and because the court erred in instructing the jury :

"1. That the paper mentioned in the indictment

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was one which required to be stamped under the revenue law.

"2. That the defendants must be presumed to know that said paper was one required to be stamped, and that it was their duty to stamp it, and that therefore the law presumes that if they omitted to do so, they intended to evade the provisions of the revenue law.

"3. That if said paper went into Coy's hands with the defendants' knowledge, or by their authority, the defendants were required to stamp it."

G. V. N. Lothrop, for the motion.

A. B. Maynard, District-Attorney, opposed.

LONGYEAR, J.—The questions arising upon this motion will be taken up in the order in which they arose in the charge, rather than the order in which they are presented in the motion. The first and second charges given present the question: Is the instrument mentioned in the indictment—(see copy, *ante*)—such an one as was required by the internal revenue law to be stamped?

If covered by the law at all, it is covered by the first clause of schedule B, under the head of "Agreement or Contract." 13 *Stat. at L.* 298.

The question, then, resolves itself simply into this: Is it an agreement or contract? The answer to this question seems too apparent to admit of argument. But as the question is presented, I shall proceed to consider it.

First. Upon the face of the instrument. The word "due" imports a consideration—an indebtedness; it is between parties capable of contracting, named in the instrument; the amount of the indebtedness or consideration is fixed and definite; the manner and place of payment is clearly defined; a promise to pay is clearly

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implied ; and it was signed by the defendants and delivered. Here are all the elements of a contract, and it is pronounced to be such by the laws of the land. An action could be maintained upon it without any other proof than that of demand and refusal.

Second. Upon matters outside the instrument. The defendants owed Coy the amount in money, for work and labor ; the due bill was charged to Coy as so much money, and thereby canceled the indebtedness in that form. Here was an *actual* consideration. It *was* due on open account in money ; it became due on written contract, in merchandise. Here was a new undertaking on both sides, as to the manner of payment. It is true, it was testified by one of the bookkeepers, that if any of these due bills should have been brought back and delivered up, by the man to whom it was payable, he would, if requested, have canceled it and credited it back to the man in his account, and so change the obligation back to a cash obligation ; but there was no pretense that there was any such agreement or understanding with the men ; and even if there had been, it could not change the character of the instrument, so long as it was out, as it was not expressed upon its face. Neither could any such verbal understanding be relied on to change the written agreement.

Therefore, by the law relating to contracts, the instrument was an agreement, and by the internal revenue law it was required to be stamped.

There was, therefore, no error in the first and second charges given.

Third. That every man is presumed to know the law, and that ignorance of the law is no excuse, as general propositions, are too well established to admit of dispute, and their correctness is virtually conceded by defendants' counsel.

Now, apply these maxims to this case. It was clearly proven, in fact it was conceded, that defendants

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authorized the instrument to be made and delivered in the form and manner in which it was made and delivered, and of course they knew it was so issued. As we have already seen, by the laws relating to contracts, the instrument, by having been so made and delivered, became and was an agreement or contract. The defendants are presumed to have known this law. Therefore, knowing as they did, all the facts constituting the instrument an agreement, they are presumed to have known it was such. Again, the instrument being an agreement, the internal revenue law made it the duty of the defendants to stamp it. Therefore, knowing, as we have seen, that it was an agreement, the defendants are presumed to have known that such was their duty.

There was, therefore, no error in the third charge given.

Fourth. As to the intent. It is a maxim of the law that every man must be presumed to intend the necessary legal or legitimate consequences of his acts. In this case, the omission of a stamp was a violation or evasion of the internal revenue law. Therefore, the defendants knowing the law, their omission to obey it must be presumed, in the absence of explanation, to have been with intent to evade its provisions.

It has been so held in two recent cases in the State of New York, in each of which this precise question was under consideration. See *Beebe v. Hutton*, 27 *Barb.* 187, 193; *Howe v. Carpenter*, 53 *Id.* 382-5.

In the case of *United States v. Conner*, 3 *McLean*, 574, a similar question was under consideration. Conner was prosecuted under the bankrupt act of 1841, for perjury, in swearing to a false schedule of property with intent to defraud his creditors. In deciding the case, Judge McLEAN makes use of this language: "The maxim is admitted that ignorance of the law constitutes no excuse for the commission of a crime." And further on he says, "To constitute perjury under

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the law" (the bankrupt law above mentioned) "the false schedule must have been made corruptly by the bankrupt, and *with intent to defraud his creditors*. The falsity of the schedule being established, the mitigating circumstances must be shown by the defendant; and if no excuse be proved, the fraudulent intent *will be inferred from the act*, it being *prima facie* in violation of the law."

So, too, in *Commonwealth v. Bradford*, 9 *Metc.* 272, cited by defendants' counsel, the knowledge of defendant that he had not the right to vote, was treated as a presumption to be rebutted by him, the fact that he had not such right having been first established.

The distinction between the two classes of cases, that in which the intent will not be presumed, and that in which it will be, is clearly drawn in 3 *Greenl. Ev.* § 13, quoting Lord MANSFIELD in *Rex v. Woodfall*, 5 *Burr.* 2667, in the following language: "When an act, *in itself indifferent*, becomes criminal if done with a particular intent, then the intent must be proved and found; but when the act is *in itself unlawful*, the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent." In this case the omission of the stamp was an unlawful act—an evasion of the provisions of the internal revenue law, and it must be deemed presumptively so intended. It comes clearly within that class of cases in which proof of justification or excuse lies on the party transgressing.

It appears, therefore, that there was no error in the fourth charge given.

Fifth. The qualification made by the court to the second request of defendant, viz: "That if the instrument got afloat without defendants' knowledge, authority or intent, they are not liable," has been fully disposed of in considering the converse of the proposition, *ante*, viz: that if the instruments went into Coy's hands,

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by defendants' authority or intent, then it was an agreement, and required a stamp. For the reasons there given there was no error in refusing to grant the request without such a qualification.

Sixth. The third request of defendants, which was refused by the court, was in the following words :

"3. That if defendants did not understand or believe that the paper in this case was a contract, but supposed it was only a voucher, then the defendants are not liable."

It might suffice to sustain the refusal to charge as above requested, to simply state the fact that there was no evidence in the case as to what the understanding or belief of the defendants was in relation to the character of the particular paper in question, or even as to the class of paper to which it belonged, and therefore it might have misled the jury to have submitted such a question to them.

It may be said, however, that evidence of their understanding and belief as to the character of the paper is to be found in presumptions arising from their course of business, in relation to this class of paper, as proven on the trial.

Relying upon such presumptions alone for proof of what defendants' understanding and belief in this respect was, the case would stand as follows : so far as this class of paper was actually used as vouchers merely between the bookkeeper and the clerks in the store, the defendants would be presumed to have understood and believed them to be vouchers merely, and not contracts ; but so far as such paper was delivered to the parties, and thereby became outstanding evidences of indebtedness and agreements to pay as therein specified, the defendants must be presumed to have understood and believed them to be what they actually were, contracts. And this latter presumption gains great force from two other facts in the case :

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1. The fact that a large proportion of these papers,—the head clerk in the store says three-fourths of them,—were delivered to the parties, and that only a small proportion of them were used as vouchers merely, from the bookkeeper to the clerks in the store. 2. The use of the word “bearer” in the instrument. Although that word has no effect to make the paper negotiable, yet it may be resorted to, to arrive at the intent, belief, or understanding of the parties, as to the use to be made of the paper. That word could be of no possible use in a paper to be used as a voucher merely; but it is just the word the parties would use if they intended the paper for circulation, however mistaken they may have been as to its legal effect. It is in proof, also, that these papers did circulate, and were bought and sold to a considerable extent, to the knowledge of defendants. Presumptions, conclusions, and inferences must always be consistent and in harmony with the facts upon which they are founded and from which they are drawn.

It might not have been error to have charged as requested; but if the court had so charged he would have been compelled, at the same time, to charge further, as above stated, which would have rendered the charge requested worse than nugatory.

Therefore, whether the refusal to give this charge was right or wrong, it has worked the defendants no injury, and could not, in any event, constitute ground for a new trial.

But it is claimed on behalf of defendants that such understanding and belief on their part, as to the character of the paper in question, was induced by or was the result of their construction of the law in its application to said paper, and that therefore the charge should have been given as requested. Or, in other words, that notwithstanding the defendants knew all the facts in the case, and notwithstanding that the law does make

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the paper a contract and liable to be stamped, yet if the defendants so construed the law for themselves as to lead them to understand and believe that said paper was not a contract, and therefore not required to be stamped, then the intent to evade the provisions of the law did not exist, and they are not liable.

In the first place, this proposition has no standing in the proofs. There was no evidence whatever as to what construction the defendants put upon the law, or that they, in fact, put any construction whatever upon it.

The argument seems to be, 1. That such construction of the law is a reasonable construction. 2. The action of defendants in omitting the stamp is consistent with such construction. 3. Therefore, they must be presumed to have adopted it.

A moment's reflection will show the entire fallacy of this argument. It has already been shown that such construction of the law is not correct, and therefore it is not reasonable, and the first proposition falls to the ground, and with it, of course, the second and third.

But aside from all this, the proposition is not a sound one in law. No man has a right to set up a construction of the law for himself, and then plead it in justification of his violation of the law. See, also, Judge BLATCHFORD's opinion in *United States v. A quantity of Distilled Spirits*, 11 *Internal Rev. Record*, 4. The distinction between what will, and what will not excuse, is very clearly drawn in *McGuire v. State*, 7 *Humph.* 56. Apply the principles there and elsewhere laid down, to this case, and the following conclusions are inevitable. If the defendants knew, as they did know, of the existence of the state of facts which made the instrument liable to a stamp, and yet believed that the instrument was not so liable, *in point of law*, such ignorance of the law will not excuse them. With a full knowledge of all the facts before them, and of the

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consequences of a violation of the law, they assume to construe the law for themselves, and having misconstrued, they must abide the consequences.

In the case of *United States v. Conner*, 3 *McLean*, 574 (above cited), cited also by defendants' counsel, the facts relied on to rebut the intent to defraud, &c., were, 1. That defendant stated the facts fully to counsel for advice in the premises; 2. That he was advised by such counsel on such statement, as matter of law, that the omission complained of was not contrary to the law claimed to have been violated; and 3. That the defendant acted upon the advice so obtained, in making out and swearing to his schedule; and this was allowed as tending to rebut the presumption of intent to violate the law, for the reason, as stated by the judge in his opinion, that "the defendant thereby showed a desire to conform to the law." That is very different from a case like the present, in which the defendants are claimed to have simply set up a construction of the law for themselves, without the aid of counsel or legal advice, or showing in any manner a desire to conform to the law. If parties may do this, and thus shield themselves from violations of law, then it is far safer for them never to take advice.

In view of the importance of these questions to the government and to the defendants, as well in their application to the case now under consideration as to other like cases, I have given them a careful consideration, with an earnest desire and determination to arrive at correct conclusions, and have settled down upon the conclusions above given with a feeling of confidence that they are correct.

The motion to set aside the verdict and for a new trial must be denied.

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*District Court; Southern District of New York,
February T., 1869.*

PROCESS ACTS.—ATTACHMENTS.—RULES OF COURT.

An information prosecuted in a district court must be regarded and treated as a common law proceeding; except in that aspect a district court can have no jurisdiction of it.

The forms of process (except style) and modes of proceeding in the United States courts, sitting within the thirteen States which originally composed the Union, in actions at common law, are the same as those which were employed in the supreme courts of the States, respectively, on May 8, 1792; except so far as the United States courts may have prescribed alterations.

Section 1 of the act of May 19, 1828, 4 *Stat. at L.* 278, relative to process of the United States courts, does not apply within States which were members of the Union before September 20, 1789. And the act of May 8, 1792, does not adopt, prospectively, laws which may have since been passed by the States (though it enables the several courts to adopt them), but only adopts those then existing.

It is not necessary, in order to establish that a particular mode of proceeding has been adopted by a United States court, that there should be found a written rule declaring such adoption. The practice of a court may be established without the existence of a positive written rule.

Under the practice which has prevailed in the district court for the southern district of New York, an attachment may be issued in aid of a common law information prosecuted by the United States.

Motion to vacate an attachment.

J. E. Ward and *C. A. Seward*, for the motion.

T. Simons, Assistant District-Attorney, opposed.

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BLATCHFORD, J.—This is an action at common law. The first paper placed on the records of the court in it was an information, which was filed on March 1, 1867. It states that the attorney of the United States comes “in a suit of common law and informs the court” that the United States bring suit against the defendant for the cause of action propounded in two articles which follow in the information. The substance of them is, that the United States were entitled to the immediate possession of certain bales of cotton, their property; that the defendant, being in possession of the cotton, unlawfully converted and disposed of it to his own use; that such conversion was fraudulent; and that the proceeds of the property had been disposed of by the defendant with intent to secrete the same from and to defraud the United States. The information prays that process of attachment may issue against the property of the defendant, and is accompanied by an affidavit in support of the application for an attachment.

Indorsed on the information is a direction signed by my predecessor, and dated February 28, 1867, in these words: “Let process of attachment issue against the property of the within-named Vernon K. Stevenson, agreeably to the prayer of the within-named information, and let the said Vernon K. Stevenson be cited to appear on the return of process herein, and answer to the allegations in this behalf.” Thereupon, process was issued to the marshal on March 1, 1867, reciting that the information had been filed “in a certain action at common law,” and commanding the marshal to cite the defendant, if found in his district, to appear and answer the information, and, also, to attach the property of the defendant. The information and the process stated the claim at the sum of one million dollars.

The return of the marshal to the process was that he had served a copy of it on the defendant, and had also served a copy of it on the president of a bank in the

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city of New York, stock in which was alleged to be owned by the defendant.

On March 1, 1867, a notice, signed by the district-attorney, and entitled in the suit and indorsed as being a *lis pendens*, was filed in the office of the clerk of this court. The notice states "that an action has been commenced, and is now pending, in this court, upon an information against the above-named defendant, and that a warrant of attachment, according to the rules and practice of this court and the statute in such case made and provided, has been duly issued therein against all and singular the property of the said defendant, Vernon K. Stevenson, both real and personal, situate and being within the city and county and State of New York, and also situate and being in the southern district of the United States for the State of New York, and that the following is a description of all and singular the real estate of the said defendant, Vernon K. Stevenson, situate and being within the said city and county and State of New York, attached, levied upon, and affected under and by virtue of said process or warrant of attachment," and closes with a specific description, by metes and bounds, of the real estate referred to, which embraces forty lots of land in the city of New York. A like notice of *lis pendens* was filed by the district-attorney in the office of the clerk of the supreme court for the city and county of New York.

The defendant put in his answer in the suit, and the issue has been tried by a jury, resulting in a verdict for the defendant, under the direction of the court, on a question of law. The government has taken steps toward a review of the decision.

The defendant now moves to vacate the attachment on the ground that it was issued without authority of law, and to set aside the notices of *lis pendens*, on the ground that they were filed without authority of law.

In regard to the attachment, it is claimed that this

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court has no authority to issue any attachment in a common law action ; that in the practice of the courts of the United States for this district, no attachments have ever been issued in common law actions ; that the right to issue attachments and the right to file notices of *lis pendens* are not matters of ordinary legal right, but exist only as creations of positive statutes ; and that there is no statute of the United States which authorizes this court to issue an attachment, or to sanction the filing of a notice of *lis pendens* in a suit of the character of the present one.

This suit must necessarily be regarded as a suit at common law, or this court would have no jurisdiction of it ; for, by sections 9 and 10 of the Judiciary Act of September 24, 1789, 1 *Stat. at L.* 77, no jurisdiction of any equity suit is given to this court, except of suits in equity against consuls or vice-consuls ; and by section 9 of that act, in connection with section 4 of the act of March 3, 1815, 3 *Stat. at L.* 245, jurisdiction is expressly given to this court of all suits at common law where the United States sue.

The statute which governs the forms of process and the forms of proceeding, and the modes of proceeding in suits at common law, in the courts of the United States, is the act of May 8, 1792, 1 *Stat. at L.* 275. The second section of that act provides that "the forms of writs, executions, and other process, except their style and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled 'An Act to regulate processes in the courts of the United States,' . . . except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of

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the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same." The act referred to, "to regulate processes in the courts of the United States," is the act of September 29, 1789, 1 *Stat. at L.* 93, the second section of which provides "that until further provision be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the supreme courts of the same." This court existed when these acts of 1789 and 1792 were passed. It, therefore, is required, by the act of 1792, to use as its forms of process and modes of proceedings in suits at common law, the forms and modes which it was using in such suits on May 8, 1792 (and which forms and modes were required by the act of 1792, taken in connection with the act of 1789, to be the forms and modes used or allowed on September 29, 1789, in the supreme court of the State of New York), subject only, as provided by the act of 1792, to any provisions contained in the Judiciary Act of September 24, 1789, 1 *Stat. at L.* 73, and also to such alterations and additions as this court shall, in its discretion, deem expedient, and also to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to this court.

The first section of the act of May 19, 1828, 4 *Stat. at L.* 278, does not apply to the present case, because the State of New York was admitted into the Union before September 30, 1789 ; and the third section of that act applies only to final process.

It is unnecessary to cite authorities to show that on September 29, 1789, there was no process of attachment of property used or allowed in the supreme court of

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New York in a common law action where an individual was the plaintiff, and where the defendant was personally served with process in the action, unless the defendant was shown to be an absconding or concealed debtor. No general process of attachment of property in a common law action in favor of an individual plaintiff was known to the common law. The only statute authority which existed on September 29, 1789, for the issuing of an attachment by the supreme court of New York in a common law action, was that conferred by the act of the legislature of New York, passed April 4, 1786, 1 *Greenl. Laws of N. Y.* 214, which provides that when a debtor secretly departs the State, or keeps concealed within it, a creditor, or creditors, to a certain amount, may apply to a judge of the supreme court showing the debt, and the departure or concealment of the debtor, with intent to defraud his creditors of their just dues, or to avoid being arrested by the ordinary process of law, and proving the departure or concealment by two credible witnesses, and obtain from the judge a warrant to attach the real and personal estate of the debtor. The present case was not one of that kind.

No provisions on the subject are found in the Judiciary Act of September 24, 1789; and the supreme court of the United States has never, by rule, prescribed any regulations to this court in regard to the issuing of attachments in common law actions.

The supreme court decided, in *Wayman v. Southard*, 10 *Wheat.* 1, that the act of 1792 was confined, in its adoption of State laws, or regulating the modes of proceeding in suits at common law, to those in force in September, 1789; that it did not recognize the authority of any laws of that description which might be afterward passed by the States; and that it enabled the several courts of the Union to make such improvements in their forms and modes of proceeding as experience

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might suggest, and especially to adopt such State laws on the subject as might vary to advantage the forms and modes of proceeding which prevailed in September, 1789.

It is not necessary that a practice of a court, to be recognized or sustained, should be embodied in a written rule. Written rules are undoubtedly preferable, but a practice in respect to a particular matter in a court may be established without the existence of a positive written rule. *Fullerton v. Bank of the United States*, 1 *Pet.* 604, 613 ; *Duncan v. United States*, 7 *Id.* 435, 451. The fact that my learned predecessor, who presided in this court for more than forty years, granted this attachment, is the strongest possible evidence that he must have regarded it as the practice of the court to issue an attachment in a case like the present one, and that he must have understood either that such practice existed in the supreme court of New York on September 29, 1789, or that a departure had been established, either by written rule or by the practice of this court, from the practice which existed in September, 1789 ; and that this court had, within section 2 of the act of 1792, altered its form of process and mode of proceeding in the suit, like the present one, in such manner as to authorize the issuing of the attachment that was issued in this case. The judge who issued it knew better than any other person the practice of this court in the respect in question, and his action in a case of the character of the present one, involving a claim of so large an amount, and affecting real estate of such large value, must be regarded by me as conclusive in regard to the fact of the establishment and existence of a practice which warranted the attachment in this case. Whether he regarded it as reposing on the privilege of a prerogative of the United States, or on the construction of some written rule of this court, or on acquiescence and uniform mode of proceeding, or on

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some specific acts of Congress, cannot be ascertained, as his views are not on record, and the point is immaterial on this application. I am satisfied, from inquiry, that the matter of issuing the attachment was deliberately considered by him, and that his conclusion was not hastily reached. The propriety of that conclusion is strengthened by the fact that nearly two years have elapsed without the authority of the court to issue the attachment being questioned by the defendant. So far, therefore, as the motion to vacate the attachment is founded upon an alleged want of authority in this court to issue it, the motion must be overruled.

The act of March 14, 1848, 9 *Stat. at L.* 213, was referred to as affecting the question. The act provides "that whenever, upon process instituted in any of the courts of the United States, property shall hereafter be attached to satisfy such judgment as may be recovered by the plaintiff in such process, and any contingency occurs by which, according to the laws of the State, such attachment would be dissolved upon like process pending in, or returnable to, the State courts, then such attachment or attachments made upon process issuing from, or pending in, the courts of the United States within such State, shall be dissolved, the intent and meaning of this act being to place such attachments in the courts of the States and the United States upon the same footing." No contingency, such as is referred to in this act, is shown to have occurred, as a ground for dissolving this attachment.

So far as the motion is based upon the ground of amnesty and pardon, of which the defendant claims the benefit, those matters go to the entire action, and not merely to the question of attachment, and must be brought up, if at all, by way of plea. The question of pardon was so brought up in the case of *Armstrong's Foundry*, 6 *Wall.* 766.

If the attachment was properly issued, it was not ir-

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regular to file in the office of the clerk of this court the notice of *lis pendens* that was filed therein. As to the one filed in the office of the clerk of the State court, this court has no control over the records of that court, or over the action of the district-attorney in filing it there.

Motion denied.

YORK'S CASE.

*Circuit Court, Fifth Circuit ; District of Louisiana,
April T., 1870.*

BANKRUPTCY.—APPEALS.—SUPERVISORY POWERS OF
CIRCUIT COURT.

In computing the time within which an appeal in bankruptcy must be taken, Sunday is to be counted, except that when the last day would fall on Sunday, that Sunday is to be excluded.

The decision of a district court, sitting in bankruptcy, upon an application to confirm a sale made of a bankrupt's estate, is not a matter within the general supervisory jurisdiction conferred by section 2 of the bankrupt law of 1867, 14 *Stat. at L.* 520, upon the circuit courts.

A proceeding in bankruptcy, from the filing of the petition to the distribution of the bankrupt's estate and his discharge, is a single statutory proceeding.

When it occurs, pending this proceeding, that the assignee or creditor is driven to file a bill in equity or bring an action at law, the circuit court has no supervisory jurisdiction of the proceedings had therein, nor has it when the claim of a supposed creditor has been rejected in whole or in part,—nor where the assignee is dissatisfied with the allowance of a claim. These classes of cases may be taken up on writ of error or appeal.

Other questions, however, arising in the district court in the progress of a case in bankruptcy, whether of legal or equitable cognizance,

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fall within the supervisory jurisdiction of the court, and may, upon bill, petition, or other proper process of any party aggrieved, be heard and determined in the circuit court as a court of equity.

Motions to dismiss an appeal and a petition.

The motions were argued before Mr. Justice BRADLEY and Judge WOODS.

Mr. Marr, for the motions.

Randolph, Singleton & Bowne, and *Hyams & Jonas*, opposed.

WOODS, J., delivered the opinion of the court. York & Hoover having been declared bankrupts by the adjudication of the district court, E. E. Norton, their assignee, filed a petition in said district court sitting as a court of bankruptcy, praying for an order to sell two plantations, the property of bankrupts. An order of sale was made, and under it a sale of the plantations, called respectively "White Hall" and "Home," was made on the sixteenth day of February, 1869, and Ober, one of the creditors, became the purchaser. On a later day in February, 1869, C. H. Slocomb, one of the creditors of York & Hoover, filed his petition in the district court, setting forth the fact of the sale to Ober, that no deed had, at the time of filing his petition, been made by Norton, the assignee, to Ober, charging that the sale was fraudulent, and therefore illegal and void, and praying, on behalf of himself and other creditors of York & Hoover, that Ober, Norton, the assignee, and others show cause, on Saturday, March 6, 1869, at eleven o'clock A. M., why the sale should not be set aside; and in the mean time that they, and each of them, might be enjoined from taking any steps towards perfecting said sale, or conveying said plantations to the purchaser.

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Pursuant to the prayer of this petition, an order was made, and the parties named were cited to show cause why the prayer of the petition should not be granted.

The minutes of the district court of the date of March 19, 1864, shows the following entry :

"No. 603. Matter of York & Hoover. On motion of H. D. Stone, attorney of E. E. Norton, and upon showing to the court that a sale was made of two plantations surrendered herein,—namely, the 'Home' and 'White Hall' plantations, situated in the parish of Concordia (here follows a description of the two plantations), on the 16th of February, 1860, and upon further showing to the court that the following parties appear to have had mortgages, privileges, claims, and liens upon said plantations (here follow the names of some fifty creditors), it is ordered that the parties above-named, and the bankrupts, and all persons interested herein, show cause on the 1st day of May, 1860, at 11 o'clock, A. M., why said sale should not be confirmed ; and at the same time the priority and rank of said mortgages, privileges, liens, and claims be fixed and adjudicated ; that, as so adjudicated, the same be directed to be paid ; that notice thereof be given by publication in the New Orleans Republican for three days, the last publication to be at least ten days before such hearing."

After this order to show cause was made by the court, precisely when we are unable to ascertain from the papers submitted to us, the Citizens' Bank of Louisiana and a large number of other creditors of York & Hoover filed an exception, in which they set out various grounds why the sale should not be confirmed, and conclude by praying that the application of the assignee for the confirmation of the sale be refused and rejected, and that said sale be set aside and annulled.

On the day fixed for the hearing of this rule, the

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matter of the rule and exceptions thereto were referred by the district court sitting in bankruptcy to a commissioner, with instructions to ascertain and report upon the validity of the sale, and the priority of the claims ; and subsequently the commissioner reported that there was no fraud or collusion in making the sale, and that certain mortgages held by Ober, Atwater & Co. on said "White Hall" and "Home" plantations were the first and best liens on those places respectively, and that the amount due on them was more than the proceeds of the sale.

Thereupon it was ordered by the court, on motion, that the report of the commissioner, if not opposed within three days, be approved and homologated.

Exceptions were filed to the report of commissioner, and afterwards,—to wit, on January 11, 1870,—the district court confirmed the sale, but reserved the question of priority of mortgages and liens for further argument. On March 31, 1870, the district court declared that the mortgages of Ober, Atwater & Co. were the first lien on said plantations, and on the proceeds of the sale thereof, and directed them to be paid in preference to any of the other mortgages set up in the oppositions of the creditors of York & Hoover, and directed the money arising from the sale to be paid to Ober, Atwater & Co.

On April 5, 1870, an application was made for a rehearing on the matters embraced in this decision of the court, and on April 27 a rehearing was refused.

The Citizens' Bank, and other creditors of York & Hoover, on May 9 took an appeal from the order of the court of March 31, which in effect dates from the refusal for rehearing on April 27. And on the same May 9 said Citizens' Bank and other creditors filed in this court a petition invoking its supervisory jurisdiction, under section 2 of the bankrupt act, and praying that the orders and decrees of the district court above

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recited be set aside, the sales of said plantations declared null and void, and the same ordered to be re-sold, and that their mortgages be decreed to have priority.

The case is heard upon two questions :

1. Whether the appeal was taken within the time limited by law ; and

2. Whether the case presented by the petitions of the Citizens' Bank and others, was a case for the supervisory jurisdiction of the court, and whether this court has jurisdiction thereof.

I. As intimated during the argument, we are of opinion that if this were a proper case for appeal, the appeal was taken too late. If Sundays are counted, the delay of ten days allowed for the appeal had expired before the appeal was taken. Unless Sundays are expressly excepted in the statute, they are to be counted. The language of section 8 of the bankrupt act is, "No appeal shall be allowed from the district to the circuit court, unless it is claimed and notice thereof given to the clerk . . . within ten days after the entry of the decree or decision appealed from." The rule for computing the number of days within which an appeal is allowed is expressly declared by section 48 of the bankrupt act as follows : "In all cases in which any particular number of days is prescribed by this act . . . for the doing of any act, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on Sunday, in which case the time shall be reckoned exclusive of that day also." The fair, and, as it seems to us, unavoidable inference, is that when Sunday is not the last day, it is not to be excluded. Applying this rule, excluding April 27, the day on which the decree was signed, the time for appeal in this case expired with May 7. The appeal not having been taken till the ninth, it was two days too late.

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II. The other question presented is, whether this is a proper case for the supervisory jurisdiction of this court.

By section 2 of the bankrupt act, it is provided that "the circuit courts in the districts where proceedings in bankruptcy are pending shall have a general superintendence and jurisdiction of all cases and questions arising under this act, and except where special provision is otherwise made may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity."

"The only construction which gives due effect to all parts of this section is that which, on the one hand, excludes from the category of general superintendence and jurisdiction of the circuit court, the appellate jurisdiction defined by section 8, and on the other brings within that category all decisions of the district court or district judge at chambers which cannot be reviewed upon appeal or writ of error under the provisions of that section." Ch. J. CHASE, in *Re Alexander*, 3 *Bank. Reg.* 6.

By section 8 of the act it is provided that appeals may be taken from the district to the circuit court in all cases in equity, and writs of error may be allowed to the circuit court from the district court in cases at law under the jurisdiction created by the bankrupt act when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim may appeal. Now, according to the decision of Chief Justice CHASE, just quoted, unless this case falls under one of the classes provided for in this section, it is a proper case for the supervisory jurisdiction of the court.

1. It is not the case of an assignee who is dissatisfied with the allowance of a claim.

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2. It is not the case of a supposed creditor, whose claim has been wholly or in part rejected. The claims of these petitioning creditors, so far as the record shows, have all been allowed in full. It is true the court has decided that their claims are not entitled to priority, and that other creditors are ; but this is not a rejection of their claims. A creditor's claim is the debt due from the bankrupt to him, and the question of priority of payment is one totally distinct from the question of the allowance or rejection of the claim or debt.

We think this is clear from section 1 of the act, which extends the jurisdiction of the court to all cases and controversies between the bankrupt and any creditor who shall claim any debt or demand under the bankruptcy ;

To the collection of the assets ;

To the ascertainment and liquidation of liens, &c. ;

To the adjustment of the various priorities and conflicting interests of all parties.

Here is an evident distinction made between the claim of a debt or demand against the bankrupt, and priority as to other creditors. A claim of priority is not a claim asserted against the bankrupt, but a right asserted against other creditors.

3. The matter decided by the district court on March 31 is not a case at law in which a writ of error would lie. This is clear, and is not disputed.

It remains, then, to consider whether it was a case in equity in which an appeal might be taken. The phrase "case in equity" in section 8, in our view means a suit in equity.

It would seem hardly necessary to cite authority to show what a case or suit in equity is.

BLACKSTONE says : "The first commencement of a suit in chancery is by preferring a bill to the lord chancellor in the style of a petition ; 'humbly complain-

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ing, sheweth to your lordship, your orator,' &c. This is in the nature of a declaration at common law, or a libel and allegation in the spiritual courts, setting forth the circumstances of the case at length ; 'and for that your orator is wholly without remedy at the common law,' relief is therefore prayed at the chancellor's hands, and also process of subpoena against the defendant, to compel him to answer under oath all the matters charged in the bill. The bill must call all the necessary parties, however remotely concerned in interest, before the court, and must be signed by counsel."

The seventh equity rule, as prescribed by the supreme court of the United States, provides that the process of subpoena shall constitute the proper mesne process in all suits in equity, to require the defendant to appear and answer the exigency of the bill. Rule 12 provides that whenever a bill is filed the clerk shall issue process of subpoena thereon, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the issuing thereof.

It is further provided in the equity rules that the appearance day shall be the rule day to which the subpoena is made returnable, provided the defendant has been served with process twenty days before that day ; otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable. And it is made the duty of defendant to file his plea, answer, or demurrer to the bill on the rule day next succeeding his appearance.

From what has preceded, it will be seen what is a case in equity, how it is instituted, and how the parties are brought into court, and when they are required to answer.

If we decide that the case before the court is not one for its revisory jurisdiction, we in effect decide that the

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matter which was passed on by the district court on March 31 was a case in equity. In other words, that a mere motion entered upon the minutes of the court without a prayer for relief, without a prayer for process, is a bill in equity ; that a notice published three times in a newspaper is service of process, and brings parties into court as if served with a subpoena in chancery ; and that a decree rendered upon such rule when only a portion of the parties referred to in the rule make any appearance whatever ; when only a part of them file any response to the motion, and that in the way of an exception, and not sworn to ; when no decrees *pro confesso* are taken against those who do not appear, is a final decree in a case in equity, from which, under the judiciary act, an appeal lies to the circuit court. The mere statement of the proposition is its own refutation. Nor do we think the case made by the petition of Slocomb, even if it was held to give character to the proceeding and decision which petitioning creditors seek to review, is any more of a case in equity than the motion of the assignee Norton by his solicitor Stone. There is scarcely anything in the petition which assimilates it to a bill in equity. It is, in fact, nothing more than a motion in writing. It simply prays that "said Ober, the said assignee, and said Girardy & Co., show cause, on a certain day, why the said sales should not be set aside as void, and until the hearing that the parties named be enjoined from taking any steps towards perfecting said sales. Only three or four of the persons interested in the question are named in the petition—the great mass of them are left out entirely ; no prayer of process ; no demand for answer under oath ; no service of process, and, in fact, scarcely any of the common incidents of a bill in equity are to be found in this petition. To call it a bill in equity, or the proceeding a case in equity, it seems to

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us is an entire misapprehension of the meaning of the terms.

But it is insisted that the setting aside a sale for fraud and determining the priorities of liens are matters of purely equitable cognizance, and therefore the proceeding sought to be reviewed is a case in equity from which appeal lies.

Courts of law frequently pass upon questions purely equitable, on motion or rule ; but the nature of the question has never been held to make such motion or rule a case in equity. It is a very common practice for courts of law, on motion, to set aside sales made by a sheriff on execution on account of some fraud or unfairness on the part of the sheriff or purchaser ; yet he would be a bold man who would insist that such a motion was a case in equity. When money is brought into court, the proceeds of a sale on execution, courts of law do not hesitate, on motion, to direct how the money shall be distributed, assuming to pass upon the priorities of claimants to the fund ; yet it has never been supposed that by so doing they were rendering a decree in chancery, or that the motion to distribute the fund according to the rights of the parties made a case in equity. These two things, passing upon the validity of a sale, and directing the distribution of the fund arising therefrom, on motion or rule to show cause, are precisely what the district court did, and we do not think the motion was a case in equity, or the ruling of the court a decree in equity. It was the simple exercise of a power incident to courts of law as well as equity, to regulate the proceedings in a case pending before it, to control its own process, and to distribute funds brought into court.

Our general view of the whole subject is this. The proceeding in bankruptcy, from the filing of the petition to the discharge of the bankrupt and the final dividend, is a single statutory case or proceeding. In the

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conduct of the case a large number of questions may arise. Before the assets of the bankrupt can be collected and distributed, it will frequently occur that the assignee or a creditor is driven to a regular bill in equity or an action at law. In these cases the circuit court has no supervisory jurisdiction, nor has it where the claim of a supposed creditor has been rejected in whole or in part, or where the assignee is dissatisfied with the allowance of a claim. These classes of cases may be taken up on writ of error or appeal. But all other cases, and questions arising in the progress of a case of bankruptcy through the bankruptcy court, whether the matter is of legal or equitable cognizance, and when the matter is not the subject of a regular suit in equity or at law, or is the allowance or disallowance of a claim, fall within the supervisory jurisdiction of the court, and may upon bill, petition, or other proper process of any party aggrieved, be heard and determined in the circuit court as a court of equity.

We think the motion to dismiss the petition of review in this case not well taken. It is, therefore, overruled.

The appeal, we think, is not well taken, both because not taken in time, and because the matter decided was not the subject of appeal. The appeal is therefore dismissed.

Norris' Case.

NORRIS' CASE.

District Court, in Bankruptcy ; Eastern District of Michigan, June T., 1870.

DISTRICT COURT.—JURISDICTION IN BANKRUPTCY.

Although, by the bankrupt law of 1867, jurisdiction in bankruptcy is conferred on the district court, instead of being vested in a new tribunal, yet the district court, when sitting as a court of bankruptcy, is to be regarded as a separate court, exercising powers and a jurisdiction distinct from its powers as a district court as originally constituted.

The district court, when sitting as a court of bankruptcy, should not decline jurisdiction of a claim presented by petition, which is within its jurisdiction as a court of bankruptcy, on the ground that the claim might be prosecuted by bill, in the district or circuit court, sitting in equity.

Petition in bankruptcy.

Philip H. Emmerson, the assignee of James W. Norris, bankrupt, filed his petition in this court, alleging that said James W. Norris, within six months before the petition for adjudication of bankruptcy was filed against him, and in the month of November, 1869, he being then solvent, and in contemplation of bankruptcy, did sell and cause to be conveyed and delivered to Charlotte M. Rogers, certain real estate in the city of Battle Creek, in this district, valued at about nine thousand dollars, and two certain promissory notes, with a view to prevent the same from coming to the assignee in bankruptcy of said Norris, and to evade the provisions of the bankrupt act, and to delay the operation and effect thereof, the said Charlotte M. Rogers

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having reasonable cause to believe that the said Norris was insolvent, and that said sale and conveyance was made by said Norris in contemplation of bankruptcy, and with the view aforesaid, and praying for injunction, and for a decree setting aside the said conveyance, and that the said Charlotte M. Rogers convey and release to the said assignee the real estate so conveyed, and deliver to him the said promissory notes.

An injunction was allowed, and an order was made and served requiring the said Charlotte M. Rogers to show cause why the relief prayed should not be granted. The said Charlotte M. Rogers now appears by her counsel and objects to the proceedings on the ground that petition is not the proper remedy, and contends that the proper remedy is by bill in equity.

Moore & Griffin, for the petitioner.

Mr. Hughes and *Mr. Russell*, in opposition.

LONGYEAR, J.—By section 1 of the bankrupt act the district courts are constituted "courts of bankruptcy," with certain general and specific powers and jurisdiction. Courts of bankruptcy, as they existed in England at the time the act was passed, were and still are separate and distinct organizations, with powers and jurisdiction separate and distinct from all other courts, and it is undoubtedly in this sense that the words are used in the act; that is, courts possessing power and jurisdiction peculiar to themselves. The only difference is that here, instead of creating a new organization, an organization already existing, known as the district court, is taken up and made use of in lieu of such new organization. But the district court, when acting as a court of bankruptcy, is none the less a separate and distinct court, and exercising powers and jurisdiction separate and distinct from its powers

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and jurisdiction as district court, than if it were such separate and distinct organization.

The general jurisdiction conferred upon the court of bankruptcy is of "all matters and proceedings in bankruptcy;" and it is further specifically provided (§ 1), that such jurisdiction shall extend, among other things, "to the collection of all the assets of the bankrupt," and "to the adjustment of the various priorities and conflicting interests of all parties."

It is clear from these provisions, and, in fact, it was conceded by counsel upon the argument, that the court of bankruptcy has jurisdiction in the premises. By what right can this court, sitting as a court of bankruptcy, refuse to entertain and exercise that jurisdiction when it is invoked? It is said that by section 2 jurisdiction is conferred on the circuit and district courts of suits at law or in equity in such cases, and that it was evidently contemplated that such course should be pursued. No doubt a party may pursue either course he may choose; but again it is asked, by what power or authority can a party be *required* to pursue the one course or the other? The jurisdiction and powers of each of these three courts,—the circuit, the district, and the bankruptcy court,—are in this respect equal and co-extensive, and the bankruptcy court has no more right to say to a party invoking the exercise of its jurisdiction, "You must reform your proceedings and seek your remedy in the district or circuit court," than the district court would have to say to a party commencing his suit there, "You must go into the bankruptcy or the circuit court," or the circuit court to say to him, "You must go into either of the other two." Much more might be said in this direction, which will be readily suggested to the mind of the thoughtful student, but I will not pursue the argument further. Neither will I presume to answer the objections raised to this course of procedure, that

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it is summary in its character, and that it is novel and inconvenient in practice. These objections have been answered so completely in the full, able, and exhaustive opinion of Judge SWAYNE, of this circuit, in *Re Neale*, 2 *Bankr. Reg.* 82, that it would be mere presumption on my part to attempt to add anything thereto.

The leading opinion in support of the opposite doctrine (that the remedy in a case like the present should be by a suit at law or in equity in the circuit or district court), is that of Judge NELSON, in *Re Kerosene Oil Co.*, 3 *Bankr. Reg.* 31. With all deference to the acknowledged learning and ability of that eminent jurist, that opinion bears evidence upon its face that it was not well considered. The argument and the conclusion are entirely unsatisfactory to my mind, particularly that portion of the argument in which he says: "It is by no means clear that an appeal would lie from a decision of the district court to the circuit court under section 8 in the summary proceedings in the present case." It is conceded that an appeal would not lie in such a case under section 8. The learned judge, however, seems to have entirely overlooked section 2, in which full provision is made for a review in such cases by the circuit court, as is clearly shown in the opinion of Chief Justice CHASE in *Re Alexander*, 3 *Bankr. Reg.* 6.

Aside, however, from the views entertained by me individually, in favor of the right and propriety of proceeding in a case like the present by petition, summarily, in the court of bankruptcy as is here done, it is to be observed that it is important that there should be as great uniformity as practicable in the manner of proceeding in the several courts; and inasmuch as the question has already been adjudicated in favor of the right to proceed in this manner by one of the presiding judges of the court before which the question raised in this case may be reviewed, I should feel it my duty,

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from considerations of a practical nature, if no other, to decide the question in conformity to that adjudication, even if I entertained serious doubts (which I do not) of its correctness.

In this case, the petition is presented in the same court in which the bankruptcy proceedings are pending, and this opinion is, of course, limited to such a case. The objection and motion are overruled, and the assignee is allowed to proceed upon his petition.

Order accordingly.

THE UNION HORSE SHOE WORKS v. LEWIS.

Circuit Court, First Circuit; District of Rhode Island, February T., 1870.

STATE STATUTES.—CORPORATIONS.

In an action brought by plaintiffs, claiming to sue as a corporation, the defendant, by plea, denied the plaintiffs' incorporation; setting up a general statute of the State which prohibited any charter from taking effect until a certain fee should have been paid into the State treasury; and averring that the plaintiffs had not made the required payment. It appeared that the fee was not paid until after the plea was filed.

Held, 1. That the circuit court was bound to take notice of the State statute, and to enforce it, in the same manner as the State courts would do.

2. That, under the statute, the plaintiffs were not competent to sue as a corporation, at the time of commencing their action, by reason of the omission to make the payment required; and that the plea must therefore be sustained.

Hearing upon an agreed statement of facts.

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Benjamin F. Thurston, for plaintiffs.

Mr. Essex, for defendant.

KNOWLES, J.—I have given to the question presented by the plea filed in this cause due consideration, and would now announce to counsel and parties the results. The plaintiffs, as holders by assignment of certain letters patent, file their bill, May 20, 1869; the defendant makes appearance July 5; and, on July 26 files a plea in abatement of the suit. To this, the plaintiffs reply, September 22, traversing the plea, and upon the issue presented the learned counsel of the parties have been fully heard at chambers.

The plaintiffs' objection to the form of the plea,* I adjudge groundless in view of the stage of the cause at which the plea is filed, the nature of the allegation which it embodies, and the rules of equity pleading as set forth in *Story Eq.* §§ 668-9 and notes, and § 727, and 2 *Dan.* 718.

The question raised by the plea is, were the plaintiffs a corporation, competent to sue, at the date of the filing of their said bill?

The plaintiffs style themselves, "The Union Horse Shoe Works, a corporation duly created by the General Assembly of the State of Rhode Island, located and doing business at Providence, in said State and District of Rhode Island;" and it is not questioned that they are bound at some stage of the suit to prove satisfactorily their title thus to describe themselves—at this

* The objection taken to the *form* of the plea was, as appears from the brief filed by the counsel for plaintiffs, that the plea simply set forth that the plaintiffs were not a corporation, duly organized under the laws of the State, without alleging what particular defect in organization, or in the act of incorporation, was relied on to defeat their corporate existence; thus leaving the plaintiffs unapprized of the objection they were required to meet.

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stage, if required by special plea,—at a later stage, had the defendant negatived the allegation in an elaborated answer. Nor is it questioned, that a failure to establish their title in this regard, were as serious a mischance at one stage as at another. But by interposing this plea, the defendant wisely constrains the plaintiffs now at the outset, to establish their right to call upon him to answer their complaints and interrogatories. He denies that they are a corporation duly created by the General Assembly of the State of Rhode Island, and the plaintiffs, in reply, reaffirm the allegation of their bill.

No question was raised as to the burden of proof upon the issue—the plaintiffs seemingly conceding that it was incumbent upon them, on exhibition of the plea, verified by the affidavit of the defendant, to make proof of their capacity to bring and maintain their suit, so far as questioned by the plea. Accordingly, a copy of an act of incorporation, certified by the Secretary of State, under the State seal, to be an act of the General Assembly of Rhode Island, at its May session, 1867, was exhibited,—the certificate, however, bearing date November 10, 1869. This instrument, the plaintiffs as a first point aver, is conclusive proof upon the issue in their favor. And in this averment I should readily concur, were the secretary's certificate of a date prior to that of the commencement of this suit, and were there not on file an agreed statement of facts to which heed must be given. Among these facts are these :

I. That one of the laws of the State, enacted by the General Assembly in 1863, and still in force, is the following (ch. 475), entitled, "An Act in addition to ch. 12 of the *Revised Statutes*, 'Of the Revenue of the State : ' "

"§ 1. No act of incorporation hereafter granted for any other than for religious, literary, charitable or cemetery purposes, or for a military or fire company, shall take effect until the persons therein incorporated

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shall have paid to the general treasurer the sum of one hundred dollars, if the capital limited by such act of incorporation is the sum or any less sum than one hundred thousand dollars ; and if the capital stock limited by such act of incorporation exceeds the sum of one hundred thousand dollars, one-tenth of one per cent. on the amount of the capital stock authorized by such act of incorporation."

"§ 2. This act shall take effect immediately after the passage thereof. *Provided, however,* that nothing herein contained shall be construed to require any such payment before the taking effect of any bank charter, when provision is made for specific taxation upon the capital stock of such bank."

II. That the plaintiffs had not, at the date of the filing of defendant's plea, paid the tax or fee required by said act of 1863, but had since, on October 1, 1869, paid the same.

With these facts before me, of the first of which, by the way, I am bound to take notice judicially, I am not warranted in regarding the certified copy of the charter as satisfactory proof of the plaintiffs' averment of personality—of a legal existence—in May, 1869.

I am unquestionably bound to deal with this plea, as it would, in my judgment, be dealt with by the supreme court of the State, and of course to give that consideration to all the State laws which that court, as a co-ordinate branch of the government, or as a branch subordinate to the general assembly, would give to them. And here is brought to my notice a general law of the State, the aim and intent of which is apparent at a glance, and the expediency and importance of which cannot be questioned. It is a parcel of the legislation which provides for the raising of moneys for the thousand uses and needs of the State, staggering under its millions of debt, and cannot be, in my view, either ignored or adjudicated a nullity by the State's judicial

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servants. And in view of this law of 1863, still in force, the defendant contends that, inasmuch as the payment required was not made until October, 1869, there was in being in May, 1869, no *person* (a corporation being in law a *person*) known as, or entitled to claim to be, "The Horse Shoe Works." And this position I am constrained to adjudge a tenable one, in the absence of any adjudication to the contrary by the supreme court of the State, or its co-ordinate or supervisor, the general assembly. So long as the law of 1863 stands unrepealed, the payment it enjoins is a condition precedent of the existence of a business corporation, for any purpose whatever. Until such payment the act is not to take effect—the paper on which it is written or printed is, in contemplation of law, a blank. What the practice of the State's secretary may be, I am uninformed, but I presume it to be what it should be—that is, to withhold from any applicant a *certified copy* of a charter under seal, until evidence is furnished that the act of incorporation has ceased to be merely a charter in embryo, and become of effect, by payment as prescribed by the parties incorporated. As already intimated, had the date of the secretary's certificate been a few months earlier, I should have received it as plenary evidence, unimpeachable otherwise than in proceedings instituted on behalf of the State. The position taken by the plaintiffs as to this point is well sustained by authority, as a dictate of common sense is usually found to be: but it seems necessary here only to say in regard to it, that under the facts in this case, I arrive at a determination of the mooted question before reaching that position.

The case is strictly *sui generis*—purely a Rhode Island case; for in no other State, it may safely be assumed, is to be found a general law like that of 1863—like in its terms, its scope, or its purposes. It may be that in some other States legislators are wont to frame

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and pass acts of incorporation, by scores and hundreds, notoriously of so little worth and so little needed that to compel the parties interested to pay for them a trifling tax to the State, a law like this is indispensable—but the proof hereof is yet to be furnished. For precedents of any practical value, therefore, it is of as little avail to search the court reports of other States as it ever has been, still is, and forever will be, when the point in question arises upon or under Rhode Island's charter from Charles II., or her constitution of 1843, with its section 10 of article 3, or the acts of her general assembly of any date, relating to bodies corporate of any species, the land titles of the aborigines or of the old proprietors, the tide flowed lands within her borders, or, indeed, any other subject of legislative action.

In most, if not in all the States of the Union, it is prescribed by a general law, or by a constitutional provision, at what period after its passage an enactment of the legislature shall take effect ; and the case, I apprehend, is not to be found where a court has failed to regard such a law or provision as an inflexible rule of procedure. Section 19 of chapter 6 of the Revised Statutes of Rhode Island ordains that "Every statute which does not expressly prescribe the time when it shall go into operation, shall take effect on the tenth day next after the rising of the general assembly at the session thereof in which the same shall be passed." This provision of the statutes, it is believed, is respected as paramount law by the courts, and the legislators of the State ; and that the law of 1863, relating especially to acts of incorporation, is not equally entitled to respect, and equally respected, is yet to be shown.

The point secondly raised by the plaintiffs,—that they are a corporation *de facto*,—I adjudge not sustainable as made under this plea. The many cases that may be cited from the thousand volumes of Ameri-

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can or English reports, seemingly sustaining it, will be found easily distinguishable from that presented in this record. The claim here is, that the Horse Shoe Works is a corporation legally created by the general assembly, by a charter produced and exhibited. This is the question distinctly raised by the plea—the only issue,—and a court which finds upon the facts and law that the instrument relied on was of no effect, at the commencement of the suit, because the parties interested omitted to make payment of the prescribed tax or fee, cannot be expected to adjudge that because, for a year or two, certain persons have wrongly assumed to be, what they are not, a body corporate, created by the State, they are now to be recognized as a corporation either *de jure* or *de facto*, entitled to institute and maintain suits in equity for discovery or relief against a tax-paying citizen of that State.

In a word, I adjudge a payment of the tax or fee as required by the act of 1863, to be a condition precedent, with which persons incorporated must comply. Of the intent of the legislature, and of the obligations of a Rhode Island court to conform their rulings to that intent, I cannot entertain a doubt. Says *Dwarr. on Stat.* 726, quoted with approval in 1 *Kent*, 464: “For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered:—What was the common law before the act? What was the mischief against which the common law does not provide? What remedy has Parliament provided to cure the defect? And what is the true reason of the remedy? It is held to be the duty of the judges to make such a construction as shall repress the mischief and advance the remedy.”

I adjudge the plea sustained, and order judgment accordingly.

Judgment for defendant.

Holmes v. Holmes.

HOLMES v. HOLMES.

*Circuit Court, Ninth Circuit ; District of Oregon,
January T., 1870.*

CANCELING DEED.—PROOF OF MARRIAGE.

Although inadequacy of price, standing alone, is not enough to warrant a court of equity in setting aside an executed conveyance; yet, where there is inadequacy of price so gross that common judgment revolts at it, a court of equity will lay hold of the slightest additional circumstances of fraud or oppression, as a ground for declaring the transaction void.

Query,—whether, in the absence of any statute declaring the mode of contracting a marriage, a contract to marry in the future, followed by copulation, can be deemed to amount to a marriage in fact?

The existing laws of California (*Hitt. Laws of Cal.* 4, 466), and of Oregon (*Oreg. Code*, 788, 785) require, in order to constitute a marriage, that the consent of the parties to become husband and wife should be avowed before a person authorized to solemnize marriages, and in the presence of two witnesses. Without the observance of these formalities, the marriage relation cannot be created in either of those States.

Citizens of a State whose laws impose restrictions upon the mode of celebrating a marriage, cannot purposely go to a place beyond its jurisdiction, and not within the jurisdiction of another State,—as, for instance, *at sea*,—and there contract a marriage in a manner contrary to the laws of the State of their residence, and afterwards have such marriage sustained by the courts within it. Such an attempt to be joined in marriage should be deemed a fraudulent evasion of the laws to which the parties owe obedience, and ought not to be held valid.

Various circumstances relied upon to establish or raise a presumption of marriage in support of a bill to enforce a claim to dower, examined; and held insufficient to support the claim.

Hearing upon a bill in equity.

Trimble, Logan & Shattuck, for complainant.

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Thayer, Page & Strong, for defendants.

DEADY, J.—This suit is brought by the complainant, styling herself Glervina O. Holmes, against Thomas J. Holmes, Jr., his brother Byron, his three married sisters—Mary A. Goodenough, Alice J. Strowbridge, and Theresa Coulson, and their husbands—to cancel and set aside a certain deed executed by complainant to defendants, and for assignment of dower in the lands affected by the deed.

The bill was filed January 26, 1869, and alleges :

I. That the complainant is a resident and citizen of the State of California, and that the defendants, except Theresa and her husband, are citizens of the State of Oregon.

II. That Thomas J. Holmes, late of Portland, Oregon, died intestate on June 18, 1867, leaving as his children and heirs at law said Thomas J. Holmes, Jr., and his brother and sisters aforesaid, and that "complainant was the lawful wife of the deceased, and lived and cohabited with him as his wife from the — day of December, 1865, to the time of his death," and "that during the said marriage," and at the time of his death, the deceased was seized in fee and possessed of certain blocks and lots of land in the city of Portland of the value of one hundred thousand dollars, the annual rents and profits of which are worth ten thousand dollars, and that it was not necessary to sell any of said real property to pay his debts, but that the same was inherited by his heirs, who have since partitioned it among themselves ; and that "complainant is the widow of said Holmes, deceased," and by the laws of Oregon was and is entitled to dower in said real property, and that the present value of such dower is not less than twenty-five thousand dollars ; and that complainant has never been barred of her dower in said property, and that the same has never been as-

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signed to her, but her right thereto is disputed by said heirs.

III. That said heirs pretend to have purchased and obtained a release of complainant's right of dower, by virtue of a certain deed signed by complainant July 31, 1867, and by which complainant, styling herself Glevina O. Holmes, conveys to the heirs of Holmes, deceased, "all her right, title, interest, claim or demand, either in law or equity, as the widow of the said Thomas J. Holmes, or otherwise," in and to the estate of said Holmes, in consideration of the sum of one thousand dollars, "and the further consideration that it was in his lifetime our wish and agreement before and in contemplation of marriage, that upon his, the said Thomas J. Holmes' death, all his property, both real and personal, should descend to his children, the heirs aforementioned, clear of and unincumbered with any claim of dower or any legal claim of myself in any manner whatever;" and that said deed "was procured by said heirs to be executed by complainant through fraud, duress, and undue influence exerted over her by said heirs, and especially by said Thomas J. Holmes, Jr., and J. M. Stowbridge," the husband of Alice J., aforesaid; and that the consideration of said deed "was grossly inadequate, and the recitals therein contained false," and the same was imprudently executed, the complainant being ignorant of the value of her interest in the estate, and unadvised of the nature and effect of said deed.

IV. The bill then sets forth the circumstances and condition of the complainant, at and before the signing of the deed, at great length and with much minuteness, to the effect that the complainant, after the death of Holmes, continued to live in the home house, but that said heirs came there also and took possession, and that said heirs then conspired with said J. M. Stowbridge to harass complainant and drive her away from

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said home, and cheat her out of her interest "in the estate of her said husband ;" and that complainant was then poor and friendless, without means of support, and "in great distress, mental and pecuniary," and without knowledge as to the value of the estate, and that she did not sign said instrument freely, but through fear of said Strowbridge and Holmes, Jr., who, "in order to induce her to release her interest in said estate, falsely accused her of criminal intercourse with said Holmes, deceased, prior to his marriage with complainant, and before the death of a former wife of said deceased, and represented to complainant that she was liable to a criminal prosecution, and unless she would give up her claim to said estate and leave the house and move out of the State, they would cause her to be prosecuted in the courts and held up to public scandal, infamy, and disgrace, and to be punished with imprisonment; and that said Strowbridge and Holmes, Jr., made it a condition of said payment of one thousand dollars that the complainant should leave the State, and to that end said sum was made payable, five hundred dollars in Portland, and the remainder in ten months after sight at Wells, Fargo & Co.'s in San Francisco.

On April 1, 1869, an answer to the bill was filed, purporting to be the answer of all the defendants except Mary A. Goodenough and her husband, but such pleading was not signed or sworn to by any of the defendants except Thomas J. Holmes, Jr. To this answer the plaintiff, on May 1, filed exceptions for scandal and impertinence and insufficiency, which were afterwards heard and allowed by the court.

On August 21, the joint and several answer of all the defendants to the bill was filed, and on September 6 the complainant filed the general replication thereto.

By the amended answer, the defendants admit the allegations of the bill concerning the citizenship of the

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parties, the death of Holmes, the nature and value of the property of which he died seized, and its subsequent partition among the defendants, his heirs.

They deny that the complainant was ever the lawful wife of the deceased, or that he ever cohabited with her as his wife, or that he ever was married to her, or "that any relation created by marriage ever existed between them."

They admit the execution of the deed by the complainant to the heirs of the deceased for the consideration mentioned in the bill, but deny that the same was executed by her otherwise than of her own free will and accord.

They aver that for a long time prior to the death of the deceased the said Thomas J. Holmes and complainant "had been lewdly and lasciviously cohabiting together," and that upon the death of said Holmes complainant freely admitted to said heirs that she had never been married to deceased, and acknowledged that she had no claim on his estate. That she was only anxious to obtain sufficient means to go to her father, in Ohio, and leave the State quietly, without exciting comment upon her conduct in having lived illicitly with the deceased, and not desiring to be turned away penniless as a cast-off wanton, and that said heirs being also anxious to prevent the relation which had existed between their father and the complainant from becoming more notorious than possible, and to remove any cloud that might exist upon said estate by reason of said relation, it was mutually agreed between the parties, that the said heirs should pay said complainant the sum of one thousand dollars, and that complainant should execute to said heirs the deed in question; and that in pursuance of such arrangement complainant executed such deed and not otherwise, and that the recitals therein contained were inserted at her special instance and request.

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On January 6 and 7 the court heard the evidence of the parties, and on January 11, the cause was argued and submitted.

Two principal questions arise in the case :

1. Were the complainant and the deceased married to one another ; and,
2. Was the deed from the complainant to the heirs wrongfully obtained from her.

Assuming that complainant was the widow of Thomas J. Holmes, she was entitled to an interest in his property worth, at the date of the deed, twenty-five thousand dollars. The mere money consideration of the deed—the sum of one thousand dollars—is such a grossly inadequate price for property of that value, as to shock the conscience and confound the judgment of a man of common sense. The unprejudiced mind revolts at it, and can only conclude that some advantage must have been taken of the complainant's ignorance or necessities. But then again, the particular charges in the bill of oppression and conspiracy by the heirs and Strowbridge to defraud the complainant in this matter, are fully denied by the answer and altogether unsupported by the proof. There is no direct proof that complainant was well advised of the value of the property affected by the deed, but at the same time there is every reason to believe, from all the circumstances, that she must have known that it was worth many times what she was receiving for it.

Under what circumstances inadequacy of price will be sufficient to set aside a sale is well stated in two cases cited by counsel for complainant. In *Hough v. Hunt*, 2 *Ohio*, 502, the court says: "The rule in chancery is well established. When a person is incumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve on account of the advantage and hardship. *When the inadequacy of the*

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price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract."

In *Osgood v. Franklin*, 2 *Johns. Ch.* 23, Chancellor KENT says: "There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression. And the inequality amounting to fraud must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense."

When a person gives twenty-five thousand dollars' worth of property for one thousand dollars, as in this case, the inadequacy is so very gross, that the court ought to "lay hold on the slightest circumstance of oppression or advantage," to set aside the sale. The fact itself furnishes good ground to conclude that the party was laboring under some controlling necessity, or was oppressed, or was ignorant of the true value of the property.

The true explanation of this matter is to be found in the solution of the question—was the complainant the lawful wife of the deceased? If she was, the inadequacy of the price is so gross and palpable that the inference is almost irresistible that the parties who procured her to sign the deed took advantage of her situation, ignorance, or some particular circumstances in her relation to the deceased, to induce or compel her to do so, and thereby intentionally obtained an unconscionable advantage to themselves which they ought not to be allowed to retain.

On the other hand, if the parties were not married, but merely living together in an unlawful manner, the matter is easily explained. The complainant, in that case, being in fact not the widow of the deceased, but only his mistress, would not be entitled to any share or

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interest in his property, and the deed and the professed consideration therefor would be as stated in the answer, only a plausible and decent sort of a contrivance between the parties to make some pecuniary provision for the complainant so as to enable her to leave the country, and at the same time, as far as possible, conceal from the general public the improper nature of the deceased's relations with her.

The question of marriage or no marriage is often an embarrassing one to decide, particularly when the evidence is wholly circumstantial, and the question arises between the issue of the alleged marriage and third persons, after the parties themselves have passed away. In this case the proof is wholly circumstantial, and the question arises between one of the parties to the supposed relation and the heirs of the other. The suit is maintained by that party, not for the purpose of establishing her status as the once wife now widow of the deceased, but for the more practical one of obtaining a widow's share of his property as against his children and heirs. In this view of the matter, it may be considered as a suit between the deceased and the complainant to determine a claim to property, unembarrassed by any consideration of the consequences of such determination upon the status or rights of third persons.

The answer admits the cohabitation of the parties as alleged in the bill, but denies the marriage. The complainant produces no direct proof of marriage, but relies upon the circumstances attending and surrounding the cohabitation as sufficient, in connection with that fact, to warrant the inference that a marriage had in fact taken place between the parties, at some time subsequent to the complainant's going from Portland to San Francisco to meet the deceased on his return from New York.

On the trial the complainant put in evidence four

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letters written by the deceased to herself while he was making a voyage to New York *via* the Isthmus, dated between October 15 and November 12, 1865, and also one dated December 3, 1865, purporting to be written by John Altman—who is claimed to be the father of complainant—to the deceased. The two sons of the deceased, Thomas J., Jr., and Byron, and his son-in-law, Strowbridge, were examined as witnesses, besides other persons not connected with the family, as to particular acts and declarations of the deceased concerning the complainant and his relations with her.

It appears that at the time of his death Thomas J. Holmes was about fifty years of age, and that the youngest of his children was then quite grown up. That for at least sixteen years he had lived in Portland, and until 1865 with a second wife, not the mother of any of his children, who then died. That the complainant is near forty years of age, and was never married, unless to the deceased. That a few years before 1865 she was living with one Captain Lyle as his mistress, who then died without making any provision for her; and that afterwards, and before the alleged marriage with the deceased, she was an inmate of a brothel in Portland; and that during some portion of the year 1865, and both prior to and at and after the death of Holmes' second wife, he kept and maintained the complainant as his mistress, in a house belonging to himself, at the corner of C and Third-streets, in the immediate vicinity of his home, and where his wife aforesaid and single children then lived.

After the death of Holmes' wife in August, 1865, and some time in the early part of October of that year, the deceased left Portland on a voyage to New York. A portion of Holmes' children continued to reside at the home house. It was during this separation that Holmes wrote complainant the letters above-mentioned. After Holmes left for New York complainant continued

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to live at the house on the corner of C and Third-streets, at the charges and expense of Holmes, until in the December or January following, when, probably in pursuance of a suggestion from Holmes, she proceeded to San Francisco to meet him on his return from New York. In the month of April, 1866, or thereabouts, both of the parties returned to Portland, and thereafter continued to live together in the home house of the deceased until his death in June 18, 1867—which was sudden and unexpected.

This is a substantial statement of the general circumstances disclosed in the testimony, which tend to show the condition of the parties at and for some time prior to the period when the relation of marriage is said to have commenced between them, and their conduct towards one another afterwards.

Besides these, there are some special circumstances upon which the complainant relies as testimony to show a marriage between herself and Holmes.

Some time in the summer of 1866, or within two or three months after Holmes returned from New York, Mr. Lakin testifies that Holmes brought complainant to the store where he was employed, and introduced her to him as Mrs. Holmes, and told him to let her have what she wanted and he would pay for it. After this, witness "sold her a considerable number of goods." Sometimes she paid for them, and sometimes they were charged to Holmes. Once or twice witness delivered parcels at the home house on C-street, and saw Holmes and complainant there, as if living together then. Witness had known Holmes well in Portland for fifteen years, but this was all he knew of his relations with the complainant, or of any recognition of her as his wife, or otherwise.

A. P. Ankeny testified that he had known Holmes many years, and had had confidential conversations with him. That he knew nothing particularly of the

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complainant, but had known her on the street for two or three years before Holmes' death. Saw Holmes and her together on the street once, and once at Holmes' house. Some two or three or four months before Holmes' death, in general conversation with witness, Holmes referred to complainant as his wife, and remarked that he had spent more happy hours in the last six months than for twenty years before. That within three or six months before Holmes' death, at the office at the theater, at the request of Holmes, witness, in company with another person whose name is not remembered, signed a paper as a witness, which he supposed to be a will, and which Holmes then said related to his effects, and that he had made provision for his wife, meaning the complainant. The statements of Mr. Ankeny were somewhat general and indefinite, and he did not profess to give the language of Holmes, but only the substance of it ; besides, it is not unlikely that in the lapse of time he has, in some degree, confounded his general impressions of the matter with the conversations themselves.

D. W. Williams testified that in June, 1866, he was commissioner of deeds for California, and that Holmes asked him to come to his house and take his wife's acknowledgment to a deed for property in California. That he knew Holmes, but not complainant, and that he went to his house, and there Holmes introduced him to a person whom he called his wife, and who signed and acknowledged the deed as his wife. That Holmes also signed and acknowledged, and that both parties told him that the property in question belonged to the wife. That because of some informality in the deed, it was returned and re-acknowledged twice before him, under similar circumstances. The testimony of Mr. Williams was direct and certain, and it shows that either the parties were then, or supposed themselves to be, husband and wife, or that they went through this

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proceeding before the commissioner for the purpose of producing the impression in this community that they were married, so as to prevent their cohabitation from giving rise to unpleasant comment and scandal, or it may have been that they had in some way held themselves out as husband and wife in California, and therefore the purchaser would not take the deed unless executed by Holmes, as well as the complainant.

Dr. I. A. Davenport testified that he had known Holmes for some time, and that he first became acquainted with complainant a few weeks before Holmes went to New York, in 1865. The complainant was then known by the name of "Clara," and Holmes had introduced her to witness by that name. Soon after Holmes' return from New York, witness said that he introduced him to complainant *as his wife*; but upon further examination he stated the occurrence in these words: "When Holmes asked me to go down to his house, I said 'How shall I address "Clara"?' and he said 'As Mrs. Holmes.'" The witness also testified that he was Holmes' physician, and that he visited the house in that capacity, and that the parties lived together as man and wife, up to the time of Holmes' death. It is apparent from the circumstances that Dr. Davenport was upon intimate and confidential relations with the deceased, and also the complainant. For instance, it appears from the correspondence of the deceased, that he repeatedly warns her against receiving visits from men during his absence, but he more than once commends witness to her, both as a physician and a friend. It also appears that witness is not upon good terms with Strowbridge and T. J. Holmes, Jr., and that he is very friendly to complainant and sympathizes with her. Supposing that at this time the parties really were married, it is singular that Dr. Davenport, the confidential friend of both parties, did not know it, and that he should ask Holmes, on

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the way to the house, "How shall I address 'Clara'?" The very question implies that while he knew the parties were living together, yet that he had no reason to believe they were husband and wife, but was in doubt in what light Holmes wished his connection with the complainant thereafter to be regarded. For instance, whether, as in the past, she was to be considered and treated, under the professional name of "Clara," simply as his mistress, or whether he wished to impart to the relation some appearance of decency and legality by treating her and addressing her *as* Mrs. Holmes. It is also remarkable, that although witness and Holmes were, as we may reasonably suppose, living in daily communication for more than a year after this marriage is alleged to have taken place, nothing appears to have ever been said about it between them, nor does it appear that Holmes in any way ever declared or intimated to witness that he had married complainant, or that she had ceased to be his mere mistress, except on the one occasion, when in reply to the direct inquiry, he told witness to address her *as* Mrs. Holmes.

Mr. Hamilton Boyd testified that he was well acquainted with Holmes in his lifetime, but did not know complainant. That he had a conversation with Holmes in which H. asked him what he thought of his marriage, as the witness understood, referring to the complainant. Witness "tried to pass it off, and said he knew nothing about it." Holmes repeated the question. Witness replied "that he had heard rumors to that effect, but never believed them." Holmes did not then say that he *was* married, but repeated the question, "What do you think of my marriage?" to which witness then replied, "It is in very bad taste;" whereupon the subject was dropped.

The testimony of this witness was distinct and unqualified. He and Holmes appear to have sustained

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friendly relations to one another, and no reason is apparent for any concealment or mystery between them about any matter which in itself was lawful and proper. Holmes seems, on this occasion, as on others, to have studiously avoided making an explicit admission that he was married to the complainant, while at the same time his conduct and expressions were calculated to give color to the impression or rumor that a marriage of some kind had taken place between them in California, before returning to Portland, in 1886.

The conversation itself is ambiguous, and may be considered as evidence, either that a private marriage had taken place between the parties, about which Holmes was then feeling the pulse of his friends as to the propriety of making public, or else that there was no marriage, but some kind of a promise or understanding that there should be one, and he was endeavoring, in this way, to ascertain how a marriage with such a person as the complainant would be regarded by his friends and the public.

In addition to these special circumstances, the complainant relies upon Holmes' letters to herself, as furnishing sufficient evidence of a promise to marry the complainant at some future time. Assuming the promise *per verba de futuro* to be so proved, it is maintained that this engagement and the subsequent copula, amount in law to a present consent, and constitute sufficient evidence of marriage. The reason assigned for this conclusion is, that the law assumes the copula was allowed on the faith of the marriage promise ; and that so the parties, at the time of the copula, accepted each other as husband and wife.

The proposition is substantially stated in the words of *Bishop on Marriage and Divorce*, § 90, where it is laid down that in the absence of any statute requiring specified forms and ceremonies, a marriage is constituted by the mere consent of the parties, and that such

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consent is to be presumed when the copula follows upon a promise to marry in the future.

But this doctrine is directly denied in *Cheeny v. Arnold*, 15 *N. Y.* 345. DENIO, C. J., delivered the opinion of the court, which was concurred in by his associates. The syllabus contains the point of the opinion, and is as follows :

“A contract to marry, *per verba de futuro*, though followed by copulation, does not amount to a marriage in fact. Such a contract, with cohabitation upon the faith of it, was ground for a decree enforcing a performance, by formal solemnization, in the ecclesiastical courts, and was for some purposes regarded as a valid marriage, by the canon law, but, it seems, never constituted a valid marriage at common law.”

It must be admitted that there are some dicta of American jurists to the contrary of this case, and in accord with the rule maintained by BISHOP; but *Cheeny v. Arnold* is later than these dicta, and carries with it the authority of an express adjudication. This is a vexed question, but I am much inclined to follow the opinion expressed by Chancellor WALWORTH, in *Rose v. Clark*, 8 *Paige Ch.* 579, that at common law no marriage was valid unless celebrated in *facie ecclesiæ*. In the earlier editions of *Kent Com.*, part 4, 87, it was stated, that :

“If the contract be made *per verba de præsenti*, and remain without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiæ*.” Upon this proposition the supreme court of the United States in *Jewell v. Jewell*, 1 *How.* 234, were equally divided, and gave no opinion. In a later edition of the Commentaries this proposition is materially qualified by inserting, after the words—“it amounts to

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a valid marriage," *in the absence of all civil regulations to the contrary*. This qualifying clause is found as early as the seventh edition, published in 1851, while the case of Cheeny v. Arnold was not decided until 1857. Modified by this clause—in the absence of *all* civil regulations to the contrary—the proposition in KENT amounts to nothing more, than that in *a state of nature* no particular form or ceremony is necessary to give validity to the consent of the parties to the contract to become husband and wife, and the same may be said of any other contract.

But admitting that the law upon this question is with the complainant, and that a contract *per verba de futuro cum copula* constitutes a marriage, is there any such contract in this correspondence? It will not be pretended that it contains any express promise to marry the complainant at any time, or an express admission that an engagement to marry ever existed between the parties. Nor do I think that any such promise or engagement can be reasonably inferred from the correspondence, when read by the light of the surrounding circumstances.

The correspondence consists of five letters, purporting to have been written by Holmes to complainant. They are dated October 15, 16, 24, 29, and November 12, 1865. The first two were written at San Francisco, immediately upon his arrival there; the next two, on board the Golden City, between San Francisco and Panama; and the fifth and last one, at New York. The first one is incomplete, being evidently continued on a second sheet which is not produced. The omission is unexplained, and the presumption is that the missing portion of the letter would not, if produced, be favorable to the complainant's case, but the contrary. There is no doubt about the authenticity of the letters. Mr. Shattuck, one of complainant's attorneys, testified that he received the letters from the hand of his client,

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a short time before she left for San Francisco, and that she left for that place about one and a half months before this suit was commenced. Byron Holmes also testified that they are in the handwriting of his father.

The letters are addressed to "Dear Clara," and are quite voluminous. Their general character is all that can be stated here. Here and there they contain expressions which readily admit of being understood in a gross and indecent sense. The language and sentiments of the correspondence, and the topics discussed in it, clearly indicate that the parties had been living in a state of concubinage or worse, and that the relation between them was a mere convention by which they agreed *hereafter*, to commit fornication *only with one another*.

The writer is constantly assuring the complainant of his continence and fidelity to her, notwithstanding the many strong temptations which surround him, and as constantly cautioning the complainant against visiting houses of prostitution or entertaining other men at her house.

True, there are also some expressions in the correspondence that may be construed as indicating that it was the purpose of the writer to marry the complainant when he returned, if her conduct was satisfactory during his absence. Among these, the strongest are, that he regretted that he had forgotten the kind of goods she wanted for a wedding dress, but would get something. That "the woman I marry, must conduct herself during my absence, so as to be above suspicion." "If you wish to become an honored wife, you must not visit houses of prostitution." No engagement to marry is alluded to, nor is the word "wife," or "marriage," or "marry," used except as above stated.

Considering the previous lives and relations of these parties, an actual promise to marry cannot reasonably be inferred from this correspondence. At best it is

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merely evidence of a purpose or understanding that thereafter the complainant would give up her former vocation, and live with Holmes, exclusively, as his mistress.

Another circumstance connected with the correspondence remains to be considered. In the letter of November 12, Holmes writes that he is about ready to return to Portland, but that he will first visit complainant's father, in Ohio, and that he would leave New York for that purpose on the 14th instant. Whether he went or not, does not directly appear, but I infer not. However, a letter is produced in evidence, dated "Felicity, Ohio, December 3, 1865," addressed to "Mr. Thomas J. Holmes," and signed "John Altman," and indorsed in the handwriting of Holmes—"From John Altman to Thomas J. Holmes." This letter came from the custody of the complainant with the others. It is brief, and begins by acknowledging the receipt of one from Holmes of "17th of November, with twenty dollars, inclosed, for which you will please accept my thanks," and proceeds—"you also desire my consent to a union with my daughter. Upon this delicate question I hope my consent is given to a gentleman of honor, of kind heart and tender feelings, and that the result will be for the good and happiness of you both, in the future. With these few lines, hoping to hear from you soon, I subscribe myself yours, respectfully."

It cannot be denied that upon the face of this letter it is asserted that Holmes, in his of November 17, had, in some way, made a proposal of marriage with "Altman's daughter." What her name was, and why the proposal was accompanied with the exact sum of twenty dollars does not appear. But why is not the letter from Holmes containing this proposal produced? If received by complainant's father, it is presumed to be in his custody, and at her service. If it was lost or destroyed, she could have her father's deposition

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taken, and prove that fact and its contents. The omission to do this is sufficient to cast suspicion upon the integrity of this so-called Altman letter.

Besides, one would hardly think that Holmes would deem it necessary to ask permission of her father, or any one else, unless it was his own family, to marry a person in the situation the complainant then was, and had been. Admitting, however, that the letter was written by complainant's father, in response to one from Holmes, asking her hand in marriage, it cannot be believed, in the light of all the other circumstances, that either Holmes or the complainant ever seriously intended anything by such proposal, other than to make an impression upon some one. For instance, the complainant knowing, or having good reason to believe, that she was regarded at home as a lost or fallen woman, might have suggested or assented to this application as a means of restoring herself, in some degree, in the estimation of her family and friends.

These are all the special circumstances relied upon by the complainant to prove a marriage in fact between herself and Holmes. Neither the time or the place of the alleged marriage is stated in the bill, and in the argument for complainant it was claimed that it might have taken place either in Oregon or California, or at sea, between here and Panama. Admitting that the marriage might have taken place where there were no civil regulations prescribing specified forms and ceremonies as necessary to give validity to the consent of the parties, in my judgment these circumstances are not sufficient to prove either a marriage *per verba de futuro cum copula* or *per verba de præsenti*.

The question of marriage or no marriage in this case, arises between one of the parties to the alleged relation, and the legal representatives of the other. The determination of it does not involve the rights or status

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of innocent third persons, who have honestly given credit to and acted upon the appearances of a marriage between the parties, or who are the issue of such parties, under circumstances where marriage was even possible. The complainant claims one-third of the property left by Holmes, as against his own children and natural heirs, upon the single ground that she was his lawful wife at the time of his death. The burden of proof is upon her to show this fact, and it is not sufficient to show that there *might* have been a marriage, but she must prove the fact directly, by the evidence of those who witnessed the contract, or by such an array of circumstances as admit of no other reasonable conclusion. It must also be a lawful marriage, contracted or celebrated according to the law of the land. The complainant contributed nothing to the accumulation of this property. She is in no sense or degree the meritorious cause of it. She went from a brothel to live with the deceased, even while his second wife was still living, and was supported by him in ease and luxury for near two years. She bore him no children, and probably rather gained than lost by the transaction. This is the extent of her merit so far as this property is concerned. Whatever she is entitled to, the *law* gives her as the *widow* of the deceased, and not otherwise, and she cannot complain if she is required to prove, with reasonable certainty, the fact upon which her claim rests—a marriage with the deceased.

Now, if any marriage ever took place between these parties, it must have been either in the State of Oregon or California. There is nothing in the evidence to warrant the conclusion that the parties ever met elsewhere, except on the steamer on the return voyage from San Francisco to Portland. This court takes judicial knowledge of the law of California. Upon the subject of marriage it provides :

"No person shall be joined in marriage unless

such person shall have first obtained a license therefor, from the clerk of the county court, which license shall authorize any judge, &c., *to celebrate and certify such marriage.*" *Hitt. Laws of Cal* 4,466.

This language is mandatory, and prohibits persons from being *joined in marriage* except upon the conditions therein prescribed.

The law of this State provides similarly :

"Before any *person can be joined in marriage*, they shall produce a license from the county clerk . . . directed to any person, &c., authorized by this act to solemnize marriage, and authorizing such person, &c., *to join together the persons therein named, as husband and wife.*" *Or. Code*, 785.

But what follows is still stronger and more direct :

"In the solemnization of marriage no particular form is required, except that *the parties thereto shall assent or declare in the presence of the minister, priest, or judicial officer solemnizing the same, and in the presence of at least two attending witnesses, that they take each other to be husband and wife.*" *Or. Code*, 783.

The consent to become husband and wife,—the contract out of which arises the relation,—must be given as herein prescribed—before a person authorized to solemnize marriage, and in the presence of two witnesses. Without the observance of these formalities, the marriage relation, it seems to me, cannot be created within the States of Oregon and California, particularly the former. Neither ought it to be. To prevent fraud and litigation, the law wisely requires certain contracts to be in writing, and signed by the parties. A single rood of land cannot be conveyed except by the deed of the vendor. How much more important it is to society and individuals that the contract upon which rests the marriage relation, the most important of all

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others, should not be made except with such attending circumstances and formalities as will serve to manifest the consent of the parties beyond question, and also preserve the evidence of it. For instance: If this marriage was contracted in Oregon or California, according to the laws of either State, it would have been done before some person authorized to celebrate marriage, and make a record of it, by which the fact could be proven directly, and beyond dispute.

Nor do I think that citizens of this State, as the complainant and deceased were, can purposely go beyond its jurisdiction, and not within the jurisdiction of another State,—as *at sea*,—and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the State is subject and owes obedience, and ought not to be held valid by them.

In *Milford v. Worcester*, 7 *Mass.* 48, a certain man and woman came before a magistrate authorized to celebrate marriage, and requested him to marry them. He refused; but the parties then and there, in the presence of the magistrate and other witnesses, declared that they took one another for lawful husband and wife, each making to the other the vows and promises usual in contracting marriages. The statute did not require any form of words for the solemnization of marriage, but that the contract was to be solemnized before a justice of the peace or minister. The action was by the issue of these parties, claiming to be their legitimate children, and the question was, whether there was a valid marriage or not between their parents, and it was determined in the negative. PARSONS, Ch. J., delivered the opinion of the court. In the course of it he says:

“Marriage being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well regulated governments,

among the first attentions of the civil magistrate to regulate marriages ; by defining the characters and relations of the parties who may marry, so as to prevent a conflict of duties, and to preserve the purity of families ; by describing the solemnities, by which the contract shall be executed, so as to guard against fraud, surprise, and seduction ; by annexing civil rights to the parties and their issue, to encourage marriage, and discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals and a dissolution of manners ; and by declaring the causes, and the judicature for rescinding the contract, when the conduct of either party and the interest of the State authorize a dissolution. *A marriage contracted by parties authorized by law to contract, and solemnized in the manner prescribed by law, is a lawful marriage ; and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage.*"

"It has been truly observed by the counsel for the plaintiffs, that a marriage engagement of this kind *is not declared void by any statute*. But we cannot thence conclude that it is recognized as valid, unless we render in a great measure nugatory all the statute regulations on this subject."

"But a marriage, merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace or an ordained minister, *is not a legal marriage*, entitled to the incidents of a marriage duly solemnized. *The woman, when a widow, cannot claim dower, nor the issue seizin by descent.*"

"Whether cohabitation, after such a pretended marriage, will subject either of the parties to punishment, as guilty of fornication, may depend on circumstances. If either of the parties were circumvented, and verily supposed the marriage legal, perhaps such party would be protected from punishment, on the general

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principle, that to constitute guilt, the mind must appear to be guilty. But every young woman of honor ought to insist on a marriage solemnized by a legal officer, and to shun the man who prates about marriage condemned by human laws as good in the sight of heaven. This cant, she may be assured, is a pretext for seduction; and if not contemned, will lead to dishonor and misery."

But I am aware that there are some loose dicta scattered through the books, to the effect that a mutual engagement to marry, between parties capable of contracting marriage, is valid, and constitutes a marriage, although not entered into or made according to the forms and before the person prescribed by the local law, unless the same is thereby expressly declared void. Without in any degree assenting to this doctrine, let it be assumed for the moment to be the law applicable to this case, while we consider whether the circumstances justify the inference that any such engagement took place between these parties.

First, it must be born in mind that under the circumstances there was little or no inducement for marriage between these parties. They had long passed the heyday and romance of youth. Their acquaintance did not commence in innocent and honorable courtship and love, but in a mercenary and criminal commerce. No innocent offspring bound them to one another, or appealed to them for protection and legitimacy. The deceased was a man in the decline of life, with a handsome fortune and a grown-up family of sons and daughters. With him the primary object of marriage—the procreation of children—had been long accomplished, and the secondary one—the avoiding of fornication—does not appear to have much concerned him. The complainant was also well advanced in years, and considering her past career, was not likely to have sought marriage for either the primary or secondary

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object of that relation. In my judgment, the most reasonable inference from even the circumstances which are claimed to favor the hypothesis of marriage, is, that the parties, after the death of Mrs. Holmes, agreed to live together *as* man and wife, that she was to be faithful to him, and he to her, as long as they lived, or remained connected. This, of course, was not an agreement then to marry, but to live together *like* husband and wife. Holmes had wealth and a home, and she was poor and out of the pale of society. She had lived as the mistress of one man, and afterwards as a prostitute. As she appears, from the testimony, there is no reason why she should decline to be Holmes' mistress, or why he should go so far as to offer her marriage as a consideration for the exclusive enjoyment of her person or society.

The parties having agreed to live together upon this footing, it was only natural that in some respects, particularly when third persons were present or concerned, they should treat one another as man and wife. Besides, Holmes had lived long in this community, and may be expected to have had some regard for appearances, as well for his own sake as that of his children around him. Indeed, at times, for this reason, he may have seriously contemplated marrying the complainant ; but when he sounded his friends about the matter, as in the conversation with Boyd, and heard their opinion of the propriety of it, he shrunk back or procrastinated the matter. He might also have intended to have made provision for her in case of his death, which was sudden, and doubtless many years before he expected it.

But this agreement to live together bound neither of them, nor did it change their status or relation to one another. Living together as man and wife, although evidence of a previous marriage, particularly so far as third persons are concerned, cannot make par-

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ties man and wife. Nor can any length of cohabitation, however exclusive, ever constitute the relation of marriage. Marriage is a relation, as much so as that of parent and child. It is founded in contract—in the consent of the parties. That consent must be mutual and absolute *per verba de presenti*,—not merely to live together exclusively, but to become joined to one another in the estate of matrimony.

In *Letters v. Cady*, 10 Cal. 527, the plaintiff sued as the widow of Cady for a share of his estate. Her complaint avowed that in 1853 she “was keeping a restaurant and public saloon in Grass Valley, and that she had accumulated in this business five or six hundred dollars; that the deceased made proposals of marriage to her, which she accepted, and consented to live with him as his true and lawful wife; that in accordance with his wishes she relinquished her business, sold her property, ‘and from thenceforth lived and cohabited with him as his wife, always conducting herself as a true and faithful and affectionate wife should do.’” There was a demurrer to the complaint. Mr. Justice FIELD delivered the opinion of the court, BALDWIN, J., concurring.

After stating the case as above, the opinion proceeds: “These are all the averments respecting the marriage, and they are entirely insufficient. *The facts alleged do not constitute a marriage.* They are only *prima facie* evidence of a marriage. *Living together ‘as man and wife’ is not marriage, nor is an agreement so to live a contract of marriage.* From the character of the allegations, and the pregnant fact that the plaintiff does not even sue in her marital name, except under an *alias*, we are led to the inference that the arrangement between her and the deceased was intended to be temporary, and *the connection one to which it would be a perversion of language to apply the name of marriage.*”

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But there are other circumstances disclosed by the testimony, the necessary inferences from which are overwhelmingly against the hypothesis that any marriage, or contract of marriage, ever took place between these parties, besides the direct testimony of some of the defendants to the admissions of the complainant to the contrary.

Byron Holmes, the younger son of the deceased, testified that he lived in the home house with the parties from the time of their return from San Francisco, in the spring of 1866, to the death of his father ; and that he never heard the complainant addressed or spoken of by the deceased or other person otherwise than as "Clara." That he never asked her, directly, if she was married to his father, but in conversation she often told him, both before and after his father's death, that she claimed none of his property ; and in reply to a question from complainant's counsel, he swore positively that in a certain letter, written by deceased to witness from San Francisco, in March, 1866, he did not inform witness that he had married complainant, but did say to him "that he had not or would not marry her." The witness also said that he had not this letter in his possession, but would produce it if counsel desired, but its production was not insisted upon by complainant.

Thomas Holmes, Jr., and Strowbridge, the administrators of the estate, both testified that soon after the death of Holmes, and while complainant was still in the house of the deceased, they conversed with her about her right to administer upon the estate, and informed her that if she had a certificate of marriage with Holmes, her right to administer should not be questioned. At first she said she had a certificate, but had promised Holmes never to produce it or show it to any one ; but upon further conversation she burst out crying, and acknowledged that she had no certificate, and

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had not been married, and that it was the second time she had been fooled, or deceived. Said she desired to go to her father, near Cincinnati, and wanted to know if witness could not raise her a certain amount of money to go with. Of course, the fact must not be overlooked, that these defendants have a large pecuniary interest in the result of this suit. But that does not necessarily discredit their testimony, although it furnishes a reason why it should be carefully considered and scrutinized. Judging from the manner of the witnesses, the intrinsic probability of their statements, and the absence of any direct contradiction of them, I see no sufficient reason for not believing them.

A. Johnson, called by complainant, testified that he had known Holmes for about fifteen years, but did not know complainant. That he was quite intimate with him, but never heard him say anything particular about complainant, and never heard him refer to her as his wife, or speak of being married. Add to this, that it does not appear that any one ever visited or received them as husband and wife, or that they ever appeared in public together; and that notwithstanding all the friends and acquaintances that Holmes, from his wealth and long residence, must have had here, no one is produced who ever heard him say that he was married to the complainant.

The very fact that the complainant released all interest in the property of the deceased, worth twenty-five thousand dollars, for the insignificant sum of one thousand dollars, is, itself, enough to raise the presumption that she did not then believe herself the widow of Holmes, and legally entitled to one-third of his property. True, she might not have been aware of the exact value of the property, but she must have known that Holmes was a man of considerable fortune, and that the dower of his wife was worth many thousand dollars. His wealth appears to have consisted almost wholly of town prop-

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erty in the city of Portland, and from her residence in the city, and intimacy with the deceased, she must have had a tolerably correct impression of the value of his estate. I am unable to discover anything in the evidence, or the circumstances of the parties, to justify the conclusion that any advantage was taken of the complainant to obtain this release. She was of mature age, had seen the world, and was not likely to have been prevented by shame or mortification from coming before the public and asserting her rights, if necessary. A woman with a reasonable claim for twenty-five thousand dollars upon a solvent estate of a deceased person need not want for friends to assert her claim, in this country. She appears to have had communication with persons outside of the family of the deceased. Dr. Davenport visited her more than once, and Ferry once. They both conversed with her privately. Ferry appears to have taken an interest in her, and advised her that the best friend she could have was a good lawyer, and doubtless would have procured her an interview with one at any time. Dr. Davenport appears to have been her friend, as well as physician, and if she had desired it, was abundantly capable, and doubtless willing, to aid her in the assertion of any right she might have had as the widow of Holmes. Indeed, there is not much room to doubt but that he knew, directly or indirectly, from the parties themselves, what the real relation between them was ; and I am satisfied that if he had had reason to believe that complainant was ever married to Holmes, he would have counseled and assisted her to maintain her right as his widow. Taken altogether, considering particularly the gross inadequacy of price, this sale of dower must have been either brought about by the defendants obtaining some controlling and unconscionable advantage over the complainant, or else it was a mere amicable and plausible contrivance between the complainant and defend-

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ants, to give the former an opportunity to leave the country with sufficient means for respectable appearances, and at the same time conceal from the public, as far as possible, the fact that she and their father had been living together in a state of concubinage. In support of the first proposition there is only the single fact of the gross inadequacy of price, and that is a sword that cuts both ways, while all the facts and presumptions of the case are either reconcilable with, or directly tend to establish the truth of the second one, and I have little doubt but that it is the correct conclusion from the premises.

In pursuance of this contrivance, and as part of it, the recitals concerning the complainant's agreement not to claim the property of the deceased were inserted in the deed, and she was also described therein and in the petition for letters of administration as the widow of Holmes. It cannot be possible that any woman knowing herself to be the lawful wife of Holmes, and entitled to his name and one-third of his comparatively large fortune, would quietly consent to relinquish all this for one thousand dollars, and also to leave the country under circumstances which she must have known and felt were a tacit admission to the contrary.

But the insuperable objection to the theory of marriage in this case arises from the silence of the complainant. If it be true that she was ever married to Holmes according to law, or that he ever attempted or pretended to marry her in any way, or by any means, or that he ever promised to marry her, the complainant knows it, and can state the fact with the essential circumstances of time and place. A woman is not likely to forget when and where she was married, whether according to the forms of law, or otherwise. In this case, there is every inducement for the complainant to state the fact, if it be a fact. Her honor and a fortune are depending upon it. That she is not

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insensible to the latter consideration, the bringing of this suit bears witness.

Yet she does not even state in her bill that she was married to Holmes. She only alleges in general terms, that she "was the lawful wife of the deceased, and lived and cohabited with him *as* his wife from the — day of December, 1865, to the time of his death." Whether she was "the lawful wife of the deceased," or not, is a question of law and fact, and no facts are stated on which to base the conclusion that she was, except that she "lived and cohabited with him *as* his wife"—that is, *like* his wife, after the manner of a wife. Now, *living* with the deceased, however long or in whatever manner, would not make her his wife. Marriage is the legal result of a mutual and absolute engagement between the parties to be husband and wife. Prescription or copula, either singly or combined, can never constitute marriage.

Again, the allegations in the bill, indefinite and unsatisfactory as they are, are not sworn to by the complainant. The bill, although it need not have been sworn to, is verified by one of complainant's solicitors, who upon this point speaks, of course, from mere information derived from the complainant.

But why does she not appear here as a witness, or give her testimony by deposition, and inform the court particularly when and where and by what means she became the lawful wife of the deceased, and why, if such be the case, she released her dower, worth twenty-five thousand dollars, for the paltry and inadequate sum of one thousand dollars? The complainant is a resident of San Francisco, and there was nothing to prevent her from being a witness in the case, either in person or by deposition. The withholding of her testimony, under the circumstances, gives good ground for presuming that it would be adverse to her claim. She asks this court to infer from circumstances that she was

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the lawful wife of Holmes, when she declines to come forward and testify to the fact under the sanction of her oath.

This circumstance alone is enough to convince any one that whatever agreement or understanding there was between her and Holmes, as to living together—and I have no doubt there was some—they never were married, or engaged to be married, in any sense of the word.

A decree must be given dismissing the bill.

Bill dismissed.

HUNT v. POOKE.

Circuit Court, First Circuit; District of Rhode Island, April T., 1870.

PRACTICE.—GRANTING NEW TRIAL.

A circuit court has power to set aside a verdict upon the ground that it is against the weight of evidence.

The power to set aside a verdict as against the weight of evidence should only be exercised where the court can clearly see that the jury have acted under some mistake or from some improper motive ; where there has been some mistrial apparent to every impartial mind without labored examination ; or where the jury have plainly departed from some rule of law, or made unwarranted deductions from the evidence.

Motion for a new trial.

B. N. & S. S. Lapham, for the motion.

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A. Payne and John F. Tobey, opposed.

KNOWLES, J.—The jury, in the case of Hunt, Tillinghast, and others against Pooke and Steere, returned a verdict against the defendants for the sum of two hundred and twenty-nine thousand four hundred and forty-two dollars and ninety cents ; and a motion is now pressed by them that it be set aside, because, as alleged, against the evidence, or the weight of evidence.

Under Federal laws, and the practice of Federal courts, motions like this are addressed to the discretion of the presiding judge, or, in case of his decease or inability, to the discretion of his successor or associate. It is assumed that his notes of the testimony sufficiently represent the evidence upon which the verdict was based ; and whenever from any cause these are not available, a report of the testimony, satisfactory to the court, must be prepared, as best it can, before the motion can be heard. In this case the jury trial took place in my presence, and the report of the evidence, as counsel presented it, is consistent in all essentials with both my notes and my recollections.

It is a noticeable fact, apparent on merely a glance at text-books and the leading reports of the State and Federal courts, that although this ground for a new trial is very frequently assigned, it is rarely insisted upon at a hearing of the motion ; and also, that whenever it is insisted upon, whether as a single ground, or as one of a series, it is rarely, very rarely sustained by a court. Nor is this the only prominent fact which the authorities, so to style them, avouch. Another is, that almost without exception, whenever a court is urged to grant a new trial upon this ground, its reasonings (if it deign to reason) betray a consciousness that, after all is said that pertinently can be in support of the right of a court to overrule a jury's finding upon the evidence legally submitted to them, there yet remains a serious

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doubt as to its power in this regard. But as I find this point *res adjudicata* in this circuit, and no question upon it is raised at the bar, I abstain from inquiry or remark concerning it. Suffice it to say, that in the opinion of Justice DANIELS, in *Mitchell v. Harmony*, 13 *How.* 138, will be found arguments and suggestions bearing upon this point, to which, in my view, a satisfactory answer is yet a desideratum. Mr. Calhoun was wont to maintain that the recognition of a right on the part of a State to nullify a law of the Federal government, was practically an invaluable safeguard against oppressive legislation on the part of the Federal government; and so may it be argued that a recognition of a right in the court to set aside a jury's verdict, because against the weight of evidence, is, to some extent, a preventive of hasty and inconsiderate findings in the jury room.

Assuming, as I am warranted in doing, that my right and power to set aside the verdict in this case is unquestionable, it is still but courteous and prudent to inquire by what rules and principles my predecessors in office in this circuit have been guided in like cases. That such rules and principles are binding as precedents, in the technical sense, cannot be contended; for when a question is addressed to the discretion of a judge, what another judge, in the exercise of *his* discretion, may have done, can be regarded but as data for argument, not as a ground of assertion and demand. What, then, has been the ruling of the eminent jurists who, as circuit judges, have heretofore administered justice in this district?

I. Justice STORY, in *Alsop v. Commercial Ins. Co.*, 1 *Sumn.* 471, says: "The next exception is that the verdict is against evidence, or at least against the weight of evidence. . . . In considering questions of this nature, I confess myself among those judges who are very reluctant to intermeddle with the verdicts of juries in mere matters of fact. . . . There was a

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time when courts were disposed to go to an extravagant length on this subject, and to set aside the verdict of a jury merely because, in the opinion of the court, the weight of evidence was on the other side. This was, indeed, substituting the court for the jury in trying the credibility of testimony and the weight of evidence. For one, I am not disposed to proceed far upon this dangerous ground; and in matters of fact I hold it to be my duty to abstain from interfering with the verdict of a jury, unless the verdict is clearly against the undoubted general current of the evidence, so that the court can clearly see that they have acted under some mistake, or from some improper motive, bias, or feeling. I adopt the language of Lord ELLENBOROUGH (see *Moore & S.* 192): 'The question before us is not whether the verdict given in this case is such as we should ourselves have given, but whether, having been given by a jury, to whom the whole case was fully left in point of fact, and to whom the law upon the subject was distinctly stated, it ought to be set aside, upon the grounds of the argument now suggested to us,—namely, that they have drawn an erroneous conclusion.' "

II. Justice WOODBURY, in *Fearing v. D'Wolf*, 3 *Woodb. & M.* 186, says: "It has been adjudicated that though in the exercise of this discretion a verdict may be set aside even when there is evidence on both sides, yet, to set aside a verdict because against the supposed weight of the evidence, it must be clearly and palpably against it. One illustration given as to this is when the evidence is all one way, except trifling or impeached matter, and the verdict is the other way. So it may be set aside if the evidence was all on one side in its tendency, no less than origin; and in this and the last case was apparently sufficient. Or when it is so strong for one side that the court did not deem it necessary to charge the jury, and the verdict was for the other side;

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or when the judge stops the defendant from putting in evidence, because there is so little for the plaintiff, and the jury find the other way. Circumstances like these show at once that there has been a mistrial. But if the mistrial or misfinding is not thus decidedly and manifestly wrong, standing out in bold relief, and clear to almost every impartial mind, and without a labored examination and comparison, the court must refuse to interfere." And for this conclusion, Justice WOODBURY proceeds to assign reasons, exhaustive of the subject.

III. Justice CURTIS, in *Wilkinson v. Greeley*, 1 *Curt.* 64, says : "I hold it to be my duty not to interfere with the verdict of a jury as being against the evidence, unless I can clearly see that the jury must have unconsciously fallen into some mistake, or been actuated by some improper motive, in rendering their verdict." And again, in *Palmer v. Fiske*, 2 *Curt.* 16, he says : "Now what I have to determine upon this motion, is, not whether I should have found this verdict, but whether I can clearly see that the jury must have fallen into some important mistake in computing the damages, or must have departed from some rule of law, or have made deductions from the evidence, which are plainly not warranted by it."

Of the views of Justice CLIFFORD, we have a very significant intimation in 1 *Cliff.* 531, in these words : "In the second place, it is insisted that the verdict is against the evidence introduced to the jury. Such motions [for a new trial] are frequently made and seldom sustained, and it is quite certain in the present case that the motion is without merit." And in 1 *Cliff.* 545, the same learned justice says : "New trial is also asked upon the ground that the verdict of the jury is against the evidence, and the question is presented in some two or three forms. One or two observations upon this point will be sufficient. When evidence is given on

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both sides, and the verdict of the jury is satisfactory to the court, the parties must not expect an extended argument from the court in disposing of the motion for a new trial. Cases of real doubt, or when the court is dissatisfied with the verdict, of course are not included in this remark. In view of the explanations given and of the whole case, I am of opinion that there was no error of law at the trial, and no reason for disturbing the verdict of the jury. The motion for a new trial is accordingly overruled."

As I have already intimated, I cannot regard the opinions of even these distinguished jurists as controlling or limiting my judicial action. My own judgment is to dictate my decision upon the question submitted to me. Still, as I find in them a rule or rules of proceeding, to which, in my view, no tenable objection can be suggested, I shall, in disposing of this motion, keep within the lines of these opinions.

Are then the defendants entitled to a new trial, for the reason assigned,—having regard to the settled practice in this circuit, as shown by these extracts from the opinions of Justice STORY and his successors?

To the question, my answer can be but in the negative; nor does it seem to me necessary or expedient, in vindication of this finding, to recapitulate or to discuss in detail the evidence submitted or the points raised.

The jury, with the exception of two members only, were the same before whom but a few weeks previously had been tried a cause between, as it were, the same parties, in the trial of which much—in fact the greater part—of this evidence was submitted. That they fully understood the evidence must be presumed, for it was put before them not hurriedly, but deliberately, and was explained and commented upon, both in the opening and close by the defendant's counsel without stint or check. Indeed, in this regard the case is without a parallel within my experience. Ordinarily it is deemed

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an objection to a jury, as a whole, that in a trial of some cause, already disposed of, they have heard the testimony which is necessarily to be submitted in the case called for trial ; and had either party at the trial asked that another jury, strangers to the facts and parties, be impaneled, he might reasonably have anticipated that his motion would have prevailed. But so it happened, that the parties were content (each objecting to one individual only) to submit the cause to the same jury to whom the replevin case had been submitted ; and, therefore, from neither can properly now be heard any imputation of bias or prepossession on the part of the jurors or any of them. That the jury were, therefore, more familiar with the facts in combination, and in detail, than is usual, and of course better qualified to deduce correct conclusions from them, as suggested or pressed by the counsel respectively, are self-evident propositions.

Furthermore, as will be recollected, the law of the case, as embodied in the charge of the court, was made known to the counsel and jury, while the defendant's counsel was closing, and accordingly the counsel's arguments were framed, and the facts classified, compared, and commented upon with especial reference to the law, as assented to by both parties. The charge of the court, substantially embodying only the rules of law thus assented to, certainly did not mislead or confuse the jury, as charges, unhappily, sometimes do ; and was, so far as appeared, satisfactory to both parties. The jury patiently heard all the evidence, and the elaborate arguments of counsel, and seemingly listened with due respect and attention to the court's charge—and then rendered their verdict. The parties had been fully heard through able counsel of their own choosing. They elected to submit their differences to the award of twelve men, impaneled as a jury, and with that, for aught that has been shown, they are

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bound to be content. I can see no legal ground for overruling or setting it aside. To do this, under the circumstances of the case, distinguished as it is from causes in general in the particulars to which I have referred, would be, in my view, to adjudge the jury to have been most pitifully wanting in barely ordinary intelligence and sagacity.

In the argument of this motion, it has been urged with great force, as it was at the trial, that the entries upon the plaintiffs' books, and the accounts rendered by them, conclusively show a payment, or settlement of the plaintiffs' account against the defendant firm ; and it is contended, seemingly with confidence, that inasmuch as the jury failed to adopt this conclusion, their verdict should be held to have been against the evidence. That this was very significant as well as very pertinent evidence, abstractly considered, cannot be questioned ; and that it should be relied on, by counsel, as of great weight, is no matter of wonder. But it is to be kept in mind that neither did the defendant's counsel in his argument to the jury contend, nor did the court charge, that this evidence was conclusive. On the contrary, the jury were instructed by the court, adopting the views of the antagonizing counsel, as expressed in their arguments, that the evidence in question was but portions of the facts entitled to consideration, and that it was not in itself conclusive evidence of an agreement, or even of an intent, on the plaintiffs' part, to release or exonerate their debtor, Pooke. In what degree that evidence tended to show such an intent or agreement, the jury were told they were to determine upon all the facts in proof. Whether or not the plaintiffs were for any reason estopped from denying that Pooke had been released by them, is a question which at the trial was not propounded to the court. Then it would not have been impertinent ; and if then propounded, would, of course, have been answered. In

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the trial of this motion, it is obviously an irrelevant inquiry.

Of my views of duty and policy, as regards instructions to juries, the counsel and parties in this case, not to say the bar and the public generally, are already apprised. My views as regards the setting aside of verdicts, I deem it not amiss, in this connection, to state in as few words as may be.

The right and power of a Federal judge in the exercise of his discretion to set aside a jury's verdict, and to grant a new trial upon terms such as he sees fit to impose, is, in view of the best authorities, not to be questioned. Whether a trial by jury in our day, the court claiming a right in its discretion to instruct the jury upon the weight as well as the relevancy of evidence, and a power in its discretion to set aside a verdict for any cause, is, in fact, the trial by jury, of the olden time of COKE and his cotemporaries,—and in eulogiums upon which so much of breath and printers' ink has been wasted by the orators and writers of Anglo-Saxondom of yesterday and of a century preceding,—is a question which I willingly refrain from raising in this connection. The power to set aside a verdict is claimed and exercised, and its value and necessity, as an agency in the prevention and correction of wrong, and the furtherance of justice and right, I fully appreciate. So long as to a chance selected jury we submit our differences and disputes, touching all our highest interests,—life, property, reputation,—it is the dictate of common sense that somewhere shall reside a power to correct the errors of ignorance, recklessness, and incapacity, and defeat the machinations of malice and fraud. For what is a jury? Nothing less nor more than (in the words of another) “a body of men, drawn by hazard from the community at large; taken forcibly from their private affairs, and without the practiced powers of analysis, of memory, and of judgment, which alone

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could enable them to detect fallacies, to unravel the tangled web of deceit, and resist the persuasions of eloquence—especially when compelled to a hurried unanimity, in cases where the wisest are compelled to doubt.”

Such the jury, the necessity of a right and power, to supervise, and, if need be, modify their findings, is apparent. But not less apparent is it, that, if a jury trial is to be anything better or more than a glittering sham, this power to set aside verdicts as against the evidence must be exercised only on rare occasions. Evidently such was the view of the eminent jurists whose opinions I have quoted, as establishing the rule of law, or rather the practice, within this circuit, my concurrence in which I have already signified.

The right of the court to instruct a jury in matters of law, is believed to be everywhere conceded ; and we know that no court entitled to respect ever hesitates to set aside a verdict when it is shown that its instructions have been ignored or contemned. The right of the jury to determine questions of fact is equally well established ; and it is undeniably as obligatory upon a court to respect a right of the jury, as to demand from the jury respect for its rights. The boundary line between the provinces of the court and jury, originally, centuries ago, clearly enough defined and seldom over-leaped, is now not easily found. In the day of Sir EDWARD COKE, the maxim of the law was : “And as with respect to the questions of law, the jury must not respond, but only the judges ; so (or in like manner or under like restriction) the judges must not respond to questions of fact, but only the jury,”—a maxim which evidently teaches that the jury and court, within their respective spheres of duty, are alike independent each of the other, and with which the practices of to-day are manifestly inconsistent. But it is of the law of to-day alone, that the occasion requires me to treat. Under

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this law, a Federal judge, exercising a discretion without limit, may, in his charges, mold a jury's determination (in the words of BLACKSTONE), "by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder ;" and may also, if he see fit, set aside the verdicts which successive juries may render, until one satisfactory to him shall be returned. *Ita lex scripta est.* For a modification of it, if desired, the power of the Federal legislature must be invoked. In this district, so far as appears, this discretion has invariably been wisely, and, therefore, blamelessly exercised. It is but reasonable and magnanimous to hope and trust that neither through ignorance, indolence, wantonness, or perverseness, will that discretion in the future be abused.

It was, in my view, no abuse of that discretion, when the Pennsylvania jurist, on the return of a verdict by a jury, on the instant exclaimed : "Mr. Clerk ! Enter an order that that verdict be set aside. I wish it to be understood that in my court it requires a verdict from thirteen to rob a banking corporation." Nor was it, in my view, any abuse of that discretion on the part of Justice CURTIS, when, at Newport, a motion for a new trial on the ground that the verdict was against the evidence, being handed him by a very able and very pertinacious member of the Rhode Island bar, he, without a moment's hesitation, said : "You can file your motion, Mr. C., but I overrule it now and at once—for I heard that case tried, and am satisfied with the verdict."

The motion for a new trial is overruled.

Judgment on the verdict for two hundred thirty-one thousand five hundred and eighty-four dollars and thirty-six cents for plaintiffs.

Jenkins v. Nicolson Pavement Co.

JENKINS v. THE NICOLSON PAVEMENT
COMPANY.*Circuit Court, Ninth Circuit; District of California, 1870.*

PATENTS.—CONSTRUCTION OF ASSIGNMENT.

An assignment of an interest in an invention and of letters patent therefor, made during the original term, carries no interest in a subsequently extended term, unless it contains a provision to that effect.

An assignment which grants "all the right, title and interest which I (the assignor) have in said invention and letters patent" . . . "to be held and enjoyed by" (naming the assignee, &c.) "to the full end of the term for which the said letters patent are or may be granted," does not operate to pass a subsequent extension. The words "for which said letters *may be granted*," may pass a subsequent reissue of the letters for the residue of the original term, but cannot be construed as including an extended term.

Action for license fees under a patent right.

SAWYER, J.—This is an action to recover the royalty established by the patentee for license to lay down the pavement known as the Nicolson pavement. In 1854, Samuel Nicolson obtained letters patent for an improvement in wooden pavements.. In December, 1863, he obtained a reissue of the letters patent. In December, 1864, said Samuel Nicolson executed the following assignment of an interest in said invention and letters patent to Jonathan Taylor, viz :

"*Whereas*, I, Samuel Nicolson, of Boston, in the State of Massachusetts, invented a certain new and useful improvement in wooden pavements, for which letters

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patent of the United States of America (numbered 1,584 of Re-issued Patents, and bearing date the first day of December, in the year 1863), have been granted to me, giving to me and my legal representatives the exclusive right of making, using and vending the said invention throughout the said United States, the original patent being dated August 8, 1853, and given for the term of fourteen years,—

“And whereas, Jonathan Taylor, of Milwaukee, in the State of Wisconsin, has agreed to purchase from me all the right, title and interest which I have in and to the said invention, for and in the city of San Francisco, in the State of California, as secured by the said letters patent, and has paid to me the sum of \$1, the receipt whereof is hereby acknowledged : Now, therefore, this indenture witnesseth, that for and in consideration of the said sum to me paid, I have assigned, sold and set over, and do hereby assign, sell, and set over unto the said Jonathan Taylor, all the right, title and interest which I have in said invention and letters patent, for and in the said city of San Francisco, but in no other place. The same to be held and enjoyed by the said Taylor, for the use and behoof of him and his legal representatives, to the full end of the term for which the said letters patent are or may be granted, as fully and effectively as the same would have been held and enjoyed by me had this assignment never been made.

“In witness whereof, I have hereunto set my signature and affixed my seal, this 1st day of December, A. D. 1864.

“SAMUEL NICOLSON.”

The patent referred to in said assignment is the same patent issued to Nicolson in 1854, erroneously referred to as issued in 1853, and reissued in 1863. Taylor, prior to August, 1868, assigned to the Nicolson

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Pavement Company, defendants in this suit, all his interest in said patent, acquired under said assignment, and the said interest was held by said defendants at the time of the commencement of this suit.

In August, 1867, said Nicolson obtained another re-issue of the said letters patent on an amended specification. Nicolson having subsequently died in January, 1868, and George T. Bigelow having been appointed his administrator, said Bigelow, in his character of administrator, in July, 1868, procured from the commissioner of patents a renewal or extension of said letters patent for seven years from August 8, 1868, in pursuance of section 18 of the act of Congress of July 4, 1836, and the act of May 27, 1848. Afterwards the plaintiff acquired, through assignment from said Bigelow as administrator, made on August 14, 1868, all his right, title, and interest in said invention and patent for the State of California. Since said August 14, 1868, the defendants, without leave or license of plaintiff, have constructed and laid down in the city of San Francisco a large amount of pavement, employing in its construction the invention for which said letters patent were issued.

The question in this case is, whether the assignment from Nicolson to Jonathan Taylor of December 1, 1864, set out in the statement of facts, vested any estate, right, title, or interest in the assignee, in or to the extended or renewed term, which was acquired by Bigelow as administrator under the act of Congress, subsequent to the date of said assignment. It is quite clear that an assignment of an interest in an invention, and letters patent therefor, before the expiration of the original term, carries with it no interest in a subsequently extended term, unless it contains a specific provision to that effect. *Wilson v. Rosseau*, 4 *How.* 646 ; *Bloomer v. McQueen*, 14 *Id.* 549 ; *Brooks v. Bicknell*, 4 *McLean*, 64 ; *Phelps v. Comstock*, *Id.* 355 ;

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Clum v. Brewer, 2 *Curt. C. Ct.* 520; *Curt. on Pat.* §§ 203, 208-9; Gibson v. Cook, 2 *Blatchf.* 146; Woodworth v. Sherman, 3 *Story*, 171; Hodge v. Hudson River R. R. Co., and Hodge v. New York & Harlem R. R. Co., by Judge BLATCHFORD, and same cases on further hearing, in MSS.

Does the assignment in question contain any stipulation for an interest in any extended term that might be acquired by the patentee under the acts of Congress? To my mind it plainly does not. The assignment recites the reissuing of a patent for an improvement in wooden pavements, in 1863; that the original patent was issued in 1853, and was "given for a term of fourteen years;" that said Jonathan Taylor had agreed to purchase all his right, title, and interest "in and to the said invention" for the city of San Francisco, in the State of California, "*as secured by said letters patent,*" the payment of the consideration, &c., and that in consideration, &c., "I have assigned, sold and set over . . . all the right, title and interest which I have in the *said* invention and *letters patent* for and in the said city of San Francisco, but in no other place, the same to be held and enjoyed by the said Taylor . . . to the full end of *the term* for which the said letters patent *are* or *may be* granted," &c. That is to say, the recitals show that the original patent had been issued for the term of fourteen years, and that before the expiration of the term there had been a reissue of the patent; that Taylor had agreed to purchase a certain interest in said invention, "*as secured by said letters patent*" (the letters patent recited, and not some others that might afterwards be issued for another term, no allusion being made to any future renewal); that in consideration of the premises he has assigned, sold, and set over to the said Taylor his interest "*in the said invention and letters patent,*"—the letters patent thereinbefore mentioned. Thus far

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there is not a word that can be tortured into an allusion to any term or letters patent other than the original term of fourteen years, and the letters patent originally issued, and the reissued letters recited.

These form the entire subject matter of the contract. There can be no doubt as to the intention of the parties, unless certain words in the habendum clause, contrary to the ordinary rules of construction, can be construed as extending the contract to a subject matter not before embraced or referred to in the recitals or granting portions of the deed. As we have seen, the habendum clause is, "the same to be held and enjoyed . . . to the full end of *the term* for which the *said* letters patent are or *may* be granted." The words "*may* be granted" are the only ones in the whole instrument that can possibly be thought to point to an extension that might subsequently be acquired. But they must be read in connection with, and subordination to, the rest of the instrument; and this very clause refers to "*the term* for which the *said* letters patent," &c.; a single term is referred to, and the *said* letters patent. The reference is in terms to the term and the letters patent already mentioned. The phrase, "may be granted," seems to be an expression loosely used, and without any definite meaning in the connection in which it is found, unless it refers to other reissues of patents covering the remainder of said term. There had already been one reissue, and the facts show that a second reissue was had, for the remainder of the term after this assignment, doubtless, to cover some defect. These reissues are authorized by the act of Congress, and often occur. In a certain sense, when the patents thus originally issued are surrendered and others issued in their place, the whole may be regarded as the same letters patent. They cover the same term. The reissued patent covers no improvement or extension, but is intended to rectify some error, or remedy some defect,

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and accomplish the identical object intended to be accomplished by the letters originally issued. In this sense they are substantially the same letters patent. In this view the words "may be granted" may have some significance as used in this instrument, and they are satisfied by applying them to any further letters patent that might be issued for the same term and to accomplish the same objects intended by those already issued. And in this instance there was a subsequent reissue for the remainder of the term, to which they might in fact apply. But upon a view of the whole instrument, to construe them as referring to a new term, and letters patent not yet *in esse*, would be doing great violence to the language. I have found no authority to justify such a construction. The language in the cases of *Phelps v. Comstock*, 4 *McLean*, 64 ; *Clum v. Brewer*, 2 *Curt.* 520 ; and *Case v. Redfield*, 4 *McLean*, 526, is entirely different. The last case comes the nearest to the present ; but in that, the language supposed to indicate an intention to include any extension or renewal that might be granted is found in the granting clause, and there are no limiting or restrictive words pointing unmistakably to the single term then unexpired, and the letters patent granted for that term. In the assignment from Nicolson to Taylor there are no apt words to indicate an intention that an interest in any extension or renewal should pass, while on the other hand there are words of limitation constantly referring back to the term already in existence, and to the letters patent issued for that term, which had alone been mentioned in the recitals and granting clause. It is highly improbable that parties contemplating a sale of an interest in an extension, or renewal, would have adopted the language used in this assignment. I am satisfied that it was not intended to assign any interest in any extension or renewal that might afterward be acquired by the patentee. The terms of the contract

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United States v. 123 casks of Distilled Spirits.

are fully satisfied by an interest in the term then granted and in the letters patent already issued, and any reissued letters for the same term.

Judgment, therefore, must be entered for the plaintiff.

UNITED STATES v. ONE HUNDRED AND TWENTY-THREE CASKS OF DISTILLED SPIRITS.

District Court; Northern District of Ohio, 1870.

PRACTICE.—AMENDMENT.

The district courts have an undoubted power, in the exercise of a sound judicial discretion, to permit a libel to be amended.

If an application to amend a libel proposes to introduce a new cause of action, it is usual to allow the amendment when the new cause of action corresponds in character and is kindred in nature to that presented in the original libel; but if the amendment introduces a new substantive cause of action and a new charge against the defendant, it is disallowed.

A libel of information was filed under a section of statute imposing punishment for disposing of property subject to internal revenue tax, in fraud of the revenue laws. The government applied for leave to amend by adding a count founded on another section of the statute, which imposed punishment on a manufacturer, &c. who should neglect to make returns of his manufactures to the proper revenue officer. *Held*, that this was a substantially new charge, and that the leave must be refused.

Motion to strike out a count from a libel of information.

United States v. 128 casks of Distilled Spirits.

R. F. Paine and *R. P. Ranney*, for the motion.

B. White and *B. T. Dickman*, opposed.

SHERMAN, J.—The libel of information was filed on February 19, 1866. The property was duly seized, but no further proceedings were had until February 12, 1869, when the claim and answer were filed, when a motion was made by the district-attorney and granted, for leave to amend the information. On the same day a new information was filed.

The first information was founded on section 48 of the internal revenue act of June 30, 1864. The first count of the new and amended one was founded on the same section, and is a copy of the original libel; but the second count was founded on section 68 of the same law.

A motion was made to strike off the amended and second count. It is claimed by the defendants that section 68 defines a new and different cause of forfeiture, the prosecution of which is limited by the proviso to the section to twenty days after the seizure.

Section 48 provides that all goods, wares, &c. &c., on which duties are imposed by law, which shall be found in the possession or custody of any person, for the purpose of being sold or removed, in fraud of the internal revenue laws, or with design to evade the payment of any tax, shall be forfeited to the United States, and the forfeiture shall be enforced by proceedings *in rem*; but there is no limitation when the seizure shall be made, or the prosecution commenced.

Section 68 provides that the owner of any vessel, still, or boiler, used in the manufacturing of any distilled spirits or fermented liquors, on which duty is payable, who shall neglect or refuse to make entry and report of the same, or to do the things required by law to be done, shall be subject to a seizure and for-

United States v. 128 casks of Distilled Spirits.

feiture of such vessels, stills, and boilers, besides being subject to a penalty: Provided, that such seizure be made within thirty days after the cause thereof came to the knowledge of the collector, and that proceedings to enforce the forfeiture be commenced within twenty days thereafter.

That the court has a right to allow amendments at any stage of the case, is undoubted; and this is applicable in revenue cases as in cases at common law. The motion is addressed to the sound legal discretion of the court. If the amendment, as in this case, adds a new count, which introduces a new cause of action, corresponding in character with the original count, and kindred in its nature, these courts have always allowed it; but if the amendment introduces a new substantive cause of action, and a new charge against the defendant, it is disallowed.

This principle of law is well illustrated in the two cases cited by the counsel,—the one in 5 *McLean*, 143, cited to support the government to its right to file this new count, and in 1 *Gall.* 124, cited by defendant to support this motion. The case in 5 *McLean* was an action at law, where in effect the plaintiff asked leave to amend his declaration by adding a third count on a note given to the plaintiff by the defendant, of the same character and founded on the same transaction as the other two notes declared on. The court permitted the amendment. The case in 1 *Gall.* was a libel for the forfeiture of a vessel for a violation of the custom laws. The first and original libel charged the vessel with landing goods without a permit; the second count in the libel, offered as an amendment, charged the vessel with receiving goods on board from another vessel. Both charges were violations of different sections of the same act. The amendment was refused.

Apply these principles to this case. If the charge

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in the second count is a new substantive charge, then the amendment is improper.

The original information, founded on section 48, punishes a party having property in his possession subject to a tax, who sells and disposes of it in fraud of the internal revenue laws, or with intent to avoid the payment of tax. The second and amended count on section 68, punishes the party being a distiller or manufacturer, who neglects or refuses to make a daily or tri-monthly report and return to the collector of the liquors and spirits made by him. One provides against fraudulent acts, and with fraudulent intents. The other is against neglect to keep proper books, and making proper returns. The one is generally against fraudulent acts, purposely committed. The other is against the omission or neglect to do certain acts. The two offenses are distinct in their nature and character. One is a general crime, and the offender may be proceeded against at any time, and upon the complaint of any person. The other is special; and seemingly the seizure and proceedings must be made by the collector, and within a limited time.

I therefore think that the second count contains a charge that is a new substantive cause of action; that it does not correspond in character, and is not kindred in its nature with the original information, and, therefore, should be stricken off.

Motion denied.

THE FIDELITER.

*Circuit Court, Ninth Circuit; District of Oregon,
May T., 1870.*

SEIZURES.—JURISDICTION OF DISTRICT COURT.

The jurisdiction of the district courts over causes of seizure, under the laws of impost, navigation, and trade, under section 9 of the judiciary act of 1789, 1 *Stat. at L.* 77, does not attach, unless it is alleged and proved that the property proceeded against was openly and visibly *seized* prior to the commencement of such proceeding; either within the district where the proceeding is had, or upon the high seas, and afterwards brought within such district.

The objection that the district court has not jurisdiction of a cause of seizure under the laws of impost, navigation, and trade, because it does not appear that the property was seized before the proceeding was commenced, may be urged successfully upon appeal in the circuit court, notwithstanding it was not taken in the district court.

Appeal from a decree of the district court, in admiralty.

This was a libel of information in a cause of seizure, filed on behalf of the United States against the Steamship Fideliter. The district court rendered a decree of condemnation; from which Lugebil, the claimant, now appealed.

SAWYER, J.—The first point made by appellant, and which, if tenable, is fatal, is, that the district court had no jurisdiction over the vessel, and that this court has now no jurisdiction.

The ground of the objection is, that the jurisdiction of the district courts of causes of "seizure under the

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laws of impost, navigation, and trade of the United States," under the provisions of section 9 of the judiciary act of 1789, 1 *Stat. at L.* 77, does not attach unless the property judicially proceeded against is seized prior to such proceeding, either in the district where the proceeding is had, or on the high seas, and brought into such district. It is insisted that an open, visible seizure by an officer of the government or other person authorized by law to seize, must precede the commencement of the judicial proceedings, and that such seizure prior to the filing of the libel must be alleged therein, and proved on the trial. Upon an examination of the authorities, I find this to be the law as settled by the decisions of the Federal courts, including the supreme court of the United States. I shall only cite the authorities, without a restatement of the reasoning upon which the decisions rest : The Ann, 9 *Cranch*, 289 ; The Silver Spring, 1 *Sprague*, 551 ; The Octavia, 1 *Gall.* 488 ; The Josefa Segunda, 10 *Wheat.* 312 ; Keene v. United States, 5 *Cranch*, 305 ; *Conkling's Treatise*, 254 ; *Ben. Adm.* 301 ; *Betts' Adm.* 68-9 ; *Gelston v. Hoyt*, 3 *Wheat.* 318 ; Rule 22, *Admiralty Rules Supreme Court U. S.*

That the objection may be taken in this court for the first time is clear, from the same authorities. In the language of SPRAGUE, J., in *The Silver Spring*, 1 *Sprague*, 553 : "This is a question of the existence of those facts, which will warrant the court in proceeding to decree a forfeiture. In requiring a seizure by the collector, prior to the filing of the libel on the part of the government, the legislature has made that fact a prerequisite to a condemnation, and the plea in this case is like the plea of not guilty to an indictment, and puts in issue all material allegations of the information, and if upon the trial, it does not appear that there was a seizure previously to the filing of the libel, the infor-

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mation is not sustained, and a forfeiture will not be decreed."

Upon a suggestion that the allegation of seizure is immaterial and might be omitted, the learned judge said: "But the information would be defective if this allegation were omitted." *Id.* 554. And this is manifestly so under the decision in *The Ann*, 9 *Cranch*, 289. The seizure is a material jurisdictional fact. In the latter case the court say: "It follows from this consideration (that the place of seizure should decide as to the proper tribunal)—that before judicial cognizance can attach upon a forfeiture *in rem*, under the statutes, there must be a seizure; for until a seizure it is impossible to ascertain what is the competent forum. And if so, it must be a good subsisting seizure at the time when the libel or information is filed and allowed. If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who made the seizure, all rights are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings, and it can be *revived only by a new seizure*." 9 *Cranch*, 291.

The 22nd Rule in Admiralty, prescribed by the supreme court, requiring the libel to state the *place of seizure*, is framed in strict accordance with the law, as thus settled by the courts. In this case the libel does not allege a seizure. It nowhere appears that there was a seizure, and the libel is therefore substantially and not merely technically defective, in failing to state a material jurisdictional fact, without which the court cannot proceed to decree a forfeiture. See also, as bearing upon this point, *Kempis v. Kennedy*, 5 *Cranch*, 185; *Turner v. President, &c.* 4 *Dall.* 8; *McCormick v. Sullivan*, 10 *Wheat.* 199; *Hodgson v. Bowerbank*, 5 *Cranch*, 303; *Capron v. Von Noorden*, 2 *Id.* 126; *Sullivan v. Fulton Steamboat Co.*, 6 *Wheat.* 450; 1 *Pet.* 258; 8 *Id.* 112; *Id.* 148. It is conceded

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also, that there was, in fact, no seizure, so that an amendment would be of no avail. It follows, therefore, that the decree of the district court must be reversed and the libel dismissed.

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11. When it occurs, pending this proceeding, that the assignee or creditor is driven to file a bill in equity or bring an action at law, the circuit court has no supervisory jurisdiction of the proceedings had therein; nor has it when the claim of a supposed creditor has been rejected in whole or in part,—nor where the assignee is dissatisfied with the allowance of a claim. These classes of cases may be taken up on writ of error or appeal. *Ib.*
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BILLS AND NOTES.

A circuit or district court has no jurisdiction to entertain an action brought by an indorsee of a promissory note where both the maker and the payee and indorser are citizens of the same State. As the payee could not have sued the maker, his assignee or indorsee cannot do so, under section 11 of the judiciary act of September 24, 1789. *So held*, notwithstanding the note was not negotiable in terms. *Shuford v. Cain*, 802.

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3. To show that the carrier was accustomed to store goods in his warehouse, on their arrival, and let them remain there until the consignee should learn from the consignor that they had come, without showing that the consignor knew of and assented to this practice, is not enough to excuse the carrier from the duty of giving notice himself to the consignee. He will continue liable as carrier, until the consignee has received, from some quarter, information of the arrival of the goods and an opportunity to remove them. *Id.*
4. The fact that after receiving such notice the consignee refuses to take the goods, cannot relieve the carrier from liability for injury sustained by them *before* that time. *Id.*
5. A carrier transported goods to the port of delivery, and then, without notifying the consignee that they had come, stored them in his warehouse; where they were injured before the consignee knew of their arrival.

Held, 1. That the carrier was liable as such, and not as warehouseman only; in the absence of affirmative proof of some facts excusing him from the duty of giving notice.

2. That, as the contract was for transportation over navigable waters, the consignor might proceed for damages, in the district court, in admiralty; notwithstanding the port of shipment and the port of delivery were both in the same State. *Id.*

6. The owners of a steam-tug or tow-boat, engaged in the business of towing vessels from point to point, but not receiving the vessels or the property on board of them into their care or custody otherwise than is involved in the mere act of towage, are not liable as common carriers in respect of such employment. To charge them for an injury to the tow, such injury must be shown to have resulted from some neglect or fault in the management of the tug. *The Neaffle*, 465.

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2. The *dicta* to the contrary, in *Scott v. Sanford*, 19 *How.* 393, disapproved. *Id.*
3. The emancipation of a native born slave, by the thirteenth amendment, removed the disability of slavery, and made him a citizen of the United States; subject, however, to any lawful restrictions imposed upon his right to vote, or other powers or privileges. *Id.*
4. Colored persons, equally with white persons, are citizens of the United States. *So held*, of one who was formerly held as a slave, and was emancipated in the general abolition of slavery throughout the State, accomplished by a new State constitution. *Turner's Case*, 84.

CIVIL RIGHTS.

1. The act of April 9, 1866, 14 *Stat. at L.* 27, known as the "civil rights" bill, is constitutional in all its provisions. It is an appropriate method of exercising the power conferred on Congress by the thirteenth amendment. *United States v. Rhodes*, 28. ●
2. The civil rights bill is not a penal statute. It is a remedial one, and is to be liberally construed. *Id.*
3. The criminal jurisdiction conferred upon the circuit and district courts by section 8 of the civil rights bill, is not confined to offenses committed by colored persons. It extends to prosecutions against white persons for offenses affecting persons who cannot enforce in the State courts the rights secured to them by section 1. *Id.*
4. A prosecution for burglary is "a cause affecting" the owner of the building entered, within the meaning of section 8 of the civil rights bill, giving the courts of the Union jurisdiction of *all causes affecting persons* who cannot enforce in the courts of the State any of the rights secured to them by the first section. If the owner of the building entered, is, on account of color, incompetent, by the law of the State where the offense is alleged to have been committed, to testify in support of the indictment as a white person might, the circuit court has jurisdiction. *Id.*
5. An indictment for burglary in entering the house of T. in Kentucky, averred that T. was of African descent, and a citizen; and that she was, by the laws of Kentucky, denied the right to testify against the defendants, they being white. There was a public statute of Kentucky, enabling white persons under simi-

CIVIL RIGHTS—*Continued.*

lar circumstances to testify. *Held*, that the indictment was sufficient, and that the circuit court might take jurisdiction under section 8 of the act of April 9, 1866, 14 *Stat. at L.* 27, known as the "civil rights" bill, notwithstanding there was no averment of the statute of Kentucky. The circuit court should take judicial notice of such statute, and the indictment should be construed in the same manner as if the statute were averred. *Id.*

6. The civil rights bill of 1866 is constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment. *Turner's Case*, 84.
7. An indenture purporting to bind a child of negro descent apprentice, which does not contain important provisions for the security and benefit of the apprentice, which are required by the general laws of the State in indentures of white apprentices, is void; under section 1 of the civil rights bill of 1866. *Id.*

CONSTITUTIONAL LAW, 18-22.

COLLISION.

1. Where, in a collision case, the evidence is so conflicting or uncertain that the court cannot determine upon which vessel the real cause of the collision should be charged, the damages should be divided between the colliding vessels. *The Comet*, 451.
2. The rules and authorities governing the apportionment of damages for collision, in cases of mutual fault, inscrutable fault, and inevitable accident,—elaborately reviewed. *Id.*

CONGRESS.

COPYRIGHT, 4; INJUNCTION, 5.

CONSIGNOR AND CONSIGNEE.

CARRIERS, 1-5.

CONSTITUTIONAL LAW.

1. The history of the adoption of the first thirteen amendments to the constitution, and the objects and proper construction of them,—explained. *United States v. Rhodes*, 28.
2. The act of April 9, 1866, 14 *Stat. at L.* 27, known as the "civil rights" bill, is constitutional in all its provisions. It is an appropriate method of exercising the power conferred on Congress by the thirteenth amendment. *Id.*

 CONSTITUTIONAL LAW—*Continued.*

8. Under the constitutional authority "to raise and support armies" (*Const.*, Art. I § VIII.), Congress has power to bestow bounties and pensions upon those who may engage in the military service of the United States. *United States v. Fairchild*, 74.
4. This power embraces and authorizes an enactment making it an offense punishable in the national courts, to detain from a military pensioner any portion of a sum collected in his behalf, as his pension. *Ib.*
5. Sections 12 and 13 of the pension act of July 4, 1864, 13 *Stat. at L.* 389, limiting the fees of agents and attorneys for making out and causing to be executed the papers necessary under the act, and providing that the receiving of any greater compensation than that prescribed shall be punishable as a misdemeanor, are, therefore, constitutional. *Ib.*
6. The civil rights bill of 1866 is constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment. *Turner's Case*, 84.
7. The ordinance of 1787, for the government of the Northwest Territory, has been superseded by the adoption of the Constitution of the United States, and the admission to the Union of the States formed from that Territory; and the provision of the ordinance declaring the navigable waters leading into the Mississippi and the Saint Lawrence "common highways and forever free," does not restrict the powers of Congress, or of the States, to legislate respecting those waters. *Woodman v. Kilbourn Manufacturing Co.*, 158.
8. In the absence of any conflicting enactment by Congress relative to the use of a navigable stream, the State within which such stream lies has power to legislate respecting it. *Ib.*
9. The right of the public to use a navigable river as a highway, is paramount to every other use of the water; but it does not exclude or forbid the legislature of the State (where no conflicting enactment by Congress exists) from authorizing the construction of public improvements upon the stream, although they may involve a partial obstruction or inconsiderable detention to navigation. *Ib.*
10. Under the constitution and laws of Wisconsin, any obstruction to the use of a navigable stream by the public for purposes of navigation, which is erected without a constitutional legislative authority, is a nuisance, and liable to be abated either at the suit of an individual or at the instance of the State. *Ib.*
11. It is competent to Congress to pass a law authorizing the president to suspend the privilege of the writ of *habeas corpus*; and

 CONSTITUTIONAL LAW—*Continued.*

- this power extends to enable them to pass laws indemnifying or protecting officers against actions for arrests previously made. *McCall v. McDowell*, 212.
12. But the president has no authority to suspend the writ of *habeas corpus*, except as authorized and directed by Congress. *Id.*
 13. The government of a State may authorize alterations to be made in the course, width, &c., of navigable streams, with a view to afford greater facilities for navigation; and for this purpose may take the property of a riparian owner, upon complying with the constitutional requirement to make compensation therefor. *Avery v. Fox*, 246.
 14. The government of the United States may authorize similar alterations in navigable streams, for the purpose of affording increased facilities for navigation between the States; and for this purpose may take the property of a riparian owner. But they can only take such property upon making or providing for just compensation. *Id.*
 15. Section 1 of the fourteenth amendment to the constitution applies to whites as well as colored people, as citizens of the United States; and is intended to protect them in their privileges and immunities as such, against the action, as well of their own State, as of other States in which they may happen to be. *Lies Stock, &c. Association v. Crescent City, &c. Co.*, 388.
 16. These privileges and immunities do not consist merely in being placed on an equality with others; but embrace all the fundamental rights of a citizen of the United States as such. *Id.*
 17. One of these fundamental rights is the right to pursue any lawful employment in a lawful manner; or, in other words, the right to choose one's own pursuit, subject only to constitutional regulations and restrictions. *Id.*
 18. An exclusive privilege, granted to a few individuals, incorporated into a body politic, and to their successors, for twenty-five years, to have cattle landings, stock yards, and slaughter houses for several miles in extent in and around the city of New Orleans; with a prohibition to all other persons from having any such establishments in said district, is a restriction which violates the fundamental rights of other citizens willing to conform to all police regulations adopted for the public comfort and safety: and a legislative act granting such an exclusive privilege is a violation of the fourteenth amendment and void. *Id.*
 19. Such a law cannot be sustained under the right of the legislature to pass license laws, and police regulations, and to grant exclusive rights for the exercise of public franchises. *Id.*

 CONSTITUTIONAL LAW—*Continued.*

20. It allows certain privileged persons to pursue an ordinary employment, and prohibits others from so doing; and thus goes to establish one of those monopolies which are contrary to the spirit of a free government. *Id.*
21. If, however, the State courts sustain such a law, and attempt to enforce it, the circuit court cannot issue an injunction to stay proceedings, being prohibited by the act of 1793, and Congress having passed no law to carry the fourteenth amendment into full effect. The remedy is to carry the suit to the highest State court, and then bring a writ of error to the supreme court of the United States. *Id.*
22. By the civil rights bill, however, which, as far as it goes, covers the same grounds as the fourteenth amendment, the circuit court may take cognizance of such a case, and grant an injunction; except as to staying proceedings already commenced in a State court. *Id.*

CONTRACTS.

1. The securities known as "Confederate treasury notes," issued by the self-styled Confederate States, during the civil war of 1861-'65, although not "bills of credit," issued by a State, and as such prohibited by the Constitution of the United States, Art. I, § x. subd. 1, were, nevertheless, illegal; because they were issued by a pretended government, organized in the name of certain States, by subjects of the United States, who were at the time in rebellion against the rightful government of the United States, with design to dismember and destroy it. *Bailey v. Milner*, 261.
2. A promissory note given in consideration of such bills is void, and does not constitute a debt provable in bankruptcy. *Id.*
3. An instrument in the following form,—“Due the bearer or” [naming a payee] ——— “dollars in merchandise out of our store,” signed on behalf of an employer, by his bookkeeper under his general instructions, and delivered to a person employed to enable him or any one to whom he may transfer it to obtain the goods, in payment for services rendered, is a contract, and requires a five-cent stamp. *United States v. Learned*, 488.

COPYRIGHT.

1. Where the exhibitor of a dramatic composition made no sufficient proof of title thereto by authorship or purchase from an author, and the facts indicated that his play was a colorable imitation

COPYRIGHT—*Continued.*

- of the performance which he sought to restrain, his application for a provisional injunction was refused. *Martinetti v. Maguire*, 356.
2. The act of August 18, 1856, 11 *Stat. at L.* 188,—declaring that any copyright granted to the author or proprietor of any dramatic composition designed or suited for public representation, shall be deemed to confer the sole right of representation,—does not extend so far as to protect mere spectacles or arrangements of scenic effects, having no literary character. An exhibition, spectacle, or scene, is not a “dramatic composition.” *Id.*
 3. Nor does the act above mentioned extend so far as to protect a composition of an immoral or indecent character. Such composition should not be deemed “suited for public representation” within the meaning of the act. *Id.*
 4. *It seems*, that Congress have not power to pass a law conferring the privilege of copyright upon immoral or indecent works or compositions. The power to pass copyright and patent laws, embraces such only as tend to “promote the progress of science and useful arts.” *Id.*

CORPORATIONS.

1. Where a charter of a corporation reserves to the legislature an unconditional power to alter or repeal the act, the corporation cannot complain that a subsequent repealing act is passed without adequate reasons. The legislature may repeal the charter arbitrarily. *Mayor, &c. of Baltimore v. Pittsburgh & Connellsville Railroad Co.*, 9.
2. But where a charter provides that “if the corporation shall at any time misuse or abuse” its franchises, the legislature may revoke the grant, the power of revocation is thereby made conditional upon the fact of some misuse or abuse; and this fact must be proved upon some inquiry giving the corporation an opportunity to be heard in defense, before the charter can be revoked. *Id.*
3. *It seems*, that a proper mode for the legislature to institute the necessary preliminary inquiry into the fact of misuse, would be to pass a resolution directing that the attorney-general institute the proper proceeding in the courts, to ascertain the fact; and that if, in such proceeding, the charge be found true, the charter be revoked. *Id.*
4. The word “corporation,” as used in a revenue law declaring that every person or corporation owning a railroad, &c. shall be subject to a tax in respect thereof (Act of June 30, 1864, § 103, 18

CORPORATIONS—*Continued.*

Stat. at L. 275, as amended by Act of March 3, 1865, 14 *Id.* 135), does not include a State. A railroad wholly owned by a State, managed by State agents, and the profits of which form a part of the revenue of the State, is not liable to taxation under such a law. *Georgia v. Atkins*, 22.

5. In an action brought by plaintiffs, claiming to sue as a corporation, the defendant, by plea, denied the plaintiffs' incorporation, setting up a general statute of the State which prohibited any charter from taking effect until a certain fee should have been paid into the State treasury; and averring that the plaintiffs had not made the required payment. It appeared in proof that the fee was not paid until after the plea was filed.

Held, 1. That the circuit court was bound to take notice of the State statute, and to enforce it, in the same manner as the State courts would do.

2. That, under the statute, the plaintiffs were not competent to sue as a corporation, at the time of commencing their action, by reason of the omission to make the payment required; and that the plea must therefore be sustained. *Union Horse Shoe Works v. Lewis*, 518.

COSTS.

PRACTICE, 11, 12.

COURTS:

IN GENERAL.

1. The fact that a contract of affreightment is to be performed wholly between ports within the same State, does not exclude it from the admiralty jurisdiction of the courts of the United States. The admiralty jurisdiction conferred by the constitution upon these courts, extends to all contracts of a maritime character to be performed upon *navigable waters*. *The Mary Washington*, 1.
2. The courts of the United States have not jurisdiction of actions against warehousemen, as such, prosecuted between citizens of the same State. *Id.*
3. A carrier transported goods to the port of delivery, and then, without notifying the consignee that they had come, stored them in his warehouse; where they were injured before the consignee knew of their arrival.

Held, 1. That the carrier was liable as such, and not as warehouseman only; in the absence of affirmative proof of some facts excusing him from the duty of giving notice.

COURTS—*Continued.*

2. That, as the contract was for transportation over navigable waters, the consignor might proceed for damages, in the district court, in admiralty; notwithstanding the port of shipment and the port of delivery were both in the same State. *Id.*
4. The extent to which State laws abolishing or restricting imprisonment for debt, are adopted for the guidance of the United States courts,—explained. *United States v. Walsh*, 66.
5. *It seems*, that a State law forbidding "imprisonment for debt, except in cases of fraud," should be construed as meaning to prohibit imprisonment for *debt arising upon contract*, except in cases of fraud; and should not be deemed to extend to imprisonment upon a judgment for a statute penalty. *Id.*
6. The courts of the United States will take judicial notice of the existence of the civil war of 1861-'65; and of the facts of public history connected with its origin and progress. *Cuyler v. Ferrill*, 169.
7. The commingling of law and equity in the same proceeding, which is allowed in the State courts of Georgia, is unknown in the national courts held within that State. These sit distinctly as courts of law, or as courts of equity. *Shuford v. Cain*, 802.
8. The court, in a capital case against Indians, though neither party asked it, and both demanded judgment, arrested judgment, *on its own motion*, for want of jurisdiction over the offense charged in the indictment; but, instead of at once ordering the discharge of the Indians, the court made a special order for turning them over to the State authorities. *United States v. Sa-coo-da-cot*, 377.
9. The forms of process (except style) and modes of proceeding in the United States courts, sitting within the thirteen States which originally composed the Union, in actions at common law, are the same as those which were employed in the supreme courts of the States, respectively, on May 8, 1792; except so far as the United States courts may have prescribed alterations. *United States v. Stevenson*, 495.
10. Section 1 of the act of May 19, 1828, 4 *Stat. at L.* 278, relative to process of the United States courts, does not apply within States which were members of the Union before September 29, 1789. And the act of May 8, 1792, does not adopt, prospectively, laws which may have since been passed by the States (though it enables the several courts to adopt them), but only adopts those then existing. *Id.*

COURTS—*Continued.*

CIRCUIT COURTS.

11. The circuit courts are competent to take cognizance of an action prosecuted by a State. *Georgia v. Atkins*, 22.
12. The circuit courts have power, in a proper case, to grant an injunction against threatened proceedings of a collector of internal revenue, to collect a tax which is not authorized by act of Congress. *Id.*
13. A prosecution for burglary is "a cause affecting" the owner of the building entered, within the meaning of section 3 of the civil rights bill, giving the courts of the Union jurisdiction of *all cases affecting persons* who cannot enforce in the courts of the State any of the rights secured to them by the first section. If the owner of the building entered, is, on account of color, incompetent by the law of the State where the offense is alleged to have been committed, to testify in support of the indictment as a white person might, the circuit court has jurisdiction. *United States v. Rhodes*, 28.
14. The criminal jurisdiction conferred upon the circuit and district courts by section 3 of the civil rights bill, is not confined to offenses committed by colored persons. It extends to prosecutions against white persons for offenses affecting persons who cannot enforce in the State courts the rights secured to them by section 1. *Id.*
15. A circuit or district court has no jurisdiction to entertain an action brought by an indorsee of a promissory note where both the maker and the payee and indorser are citizens of the same State. As the payee could not have sued the maker, his assignee or indorsee cannot do so, under section 11 of the judiciary act of September 24, 1789. *So held*, notwithstanding the note was not negotiable in terms. *Shuford v. Cain*, 302.
16. An exclusive privilege, granted to a few individuals, incorporated into a body politic, and to their successors, for twenty-five years, to have cattle landings, stock yards, and slaughter houses for several miles in extent in and around the city of New Orleans; with a prohibition to all other persons from having any such establishments in said district, is a restriction which violates the fundamental rights of other citizens willing to conform to all police regulations adopted for the public comfort and safety: and a legislative act granting such an exclusive privilege is a violation of the fourteenth amendment and void. *Live Stock, &c. Association v. Crescent City, &c. Co.*, 333.
17. Such a law cannot be sustained under the right of the legislature

COURTS—*Continued.*

- to pass license laws and police regulations, and to grant exclusive rights for the exercise of public franchises. *Id.*
18. It allows certain privileged persons to pursue an ordinary employment, and prohibits others from so doing; and thus goes to establish one of those monopolies which are contrary to the spirit of a free government. *Id.*
 19. If, however, the State courts sustain such a law, and attempt to enforce it, the circuit court cannot issue an injunction to stay proceedings, being prohibited by the act of 1793, and Congress having passed no law to carry the fourteenth amendment into full effect. The remedy is to carry the suit to the highest State court, and then bring a writ of error to the supreme court of the United States. *Id.*
 20. By the civil rights bill, however, which, as far as it goes, covers the same grounds as the fourteenth amendment, the circuit court may take cognizance of such a case, and grant an injunction; except as to staying proceedings already commenced in a State court. *Id.*
 21. The decision of a district court, sitting in bankruptcy, upon an application to confirm a sale made of a bankrupt's estate, is not a matter within the general supervisory jurisdiction conferred by section 2 of the bankrupt law of 1867, 14 *Stat. at L.* 520, upon the circuit courts. *York's Case*, 508.
 22. In an action brought by plaintiffs, claiming to sue as a corporation, the defendant, by plea, denied the plaintiffs' incorporation; setting up a general statute of the State which prohibited any charter from taking effect until a certain fee should have been paid into the State treasury; and averring that the plaintiffs had not made the required payment. It appeared that the fee was not paid until after the plea was filed.
Held, 1. That the circuit court was bound to take notice of the State statute, and to enforce it, in the same manner as the State courts would do.
 2. That, under the statute, the plaintiffs were not competent to sue as a corporation, at the time of commencing their action, by reason of the omission to make the payment required; and that the plea must therefore be sustained. *Union Horse Shoe Works v. Lewis*, 518.
 23. A circuit court has power to set aside a verdict upon the ground that it is against the weight of evidence. *Hunt v. Poole*, 556.
 24. The power to set aside a verdict as against the weight of evidence should only be exercised where the court can clearly see that the jury have acted under some mistake or from some improper

COURTS—*Continued.*

motive; where there has been some mistrial apparent to every impartial mind without labored examination; or where the jury have plainly departed from some rule of law, or made unwarranted deductions from the evidence. *Id.*

25. The objection that the district court has not jurisdiction of a cause of seizure under the laws of impost, navigation, and trade, because it does not appear that the property was seized before the proceeding was commenced, may be urged successfully upon appeal in the circuit court, notwithstanding it was not taken in the district court. *The Fideliter*, 577.

DISTRICT COURTS.

26. A district court has not power to enjoin the prosecution of an action in a State court. *Campbell's Case*, 185.
27. The bankrupt act of 1867 does not confer such power, even in aid of proceedings in bankruptcy; nor does it impair the rule prescribed by the act of March 3, 1793, forbidding injunctions to stay proceedings in courts of a State. *Id.*
28. The extent of powers of a supervisor of internal revenue to order persons chargeable with a tax to appear before him for examination, and to produce books and papers; and the powers of a district court to punish disobedience to such order as a contempt,—explained. *Meador's Case*, 317.
29. An information prosecuted in a district court must be regarded and treated as a common law proceeding; except in that aspect a district court can have no jurisdiction of it. *United States v. Stevenson*, 495.
30. Although, by the bankrupt law of 1867, jurisdiction in bankruptcy is conferred on the district court, instead of being vested in a new tribunal, yet the district court, when sitting as a court of bankruptcy, is to be regarded as a separate court, exercising powers and a jurisdiction distinct from its powers as a district court as originally constituted. *Norris' Case*, 514.
31. The district court, when sitting as a court of bankruptcy, should not decline jurisdiction of a claim presented by petition, which is within its jurisdiction as a court of bankruptcy, on the ground that the claim might be prosecuted by bill, in the district or circuit court, sitting in equity. *Id.*
32. The district courts have an undoubted power, in the exercise of a sound judicial discretion, to permit a libel to be amended. *United States v. One hundred and twenty-three casks of Distilled Spirits*, 578.
33. The jurisdiction of the district courts over causes of seizure,

COURTS—*Continued.*

under the laws of impost, navigation, and trade, under section 9 of the judiciary act of 1789, 1 *Stat. at L.* 77, does not attach, unless it is alleged and proved that the property proceeded against was openly and visibly *seized* prior to the commencement of such proceeding; either within the district where the proceeding is had, or upon the high seas, and afterwards brought within such district. *The Fidelity*, 577.

Supra, 14, 15, 21, 25.

STATE COURTS.

84. During the civil war of 1861-'65, some of the devisees of lands lying in Georgia, commenced proceedings for a partition of the lands, in one of the courts of Georgia. A partition was ordered and a sale made. At the time when the proceedings were pending, one of the devisees was in the discharge of his duties as a surgeon in the United States army; and was prevented from communication with the State of Georgia, by the war. *Held*, that the proceedings of the Georgia court were void, as against such devisee, for want of jurisdiction. *Ogley v. Ferrill*, 169.
85. A State court has no power to entertain an appeal or other proceeding to review an order made in such court granting a petition to remove a cause from the State court to a court of the United States; nor can the State court withhold or delay the transfer of the record from its clerk's office to the United States court pending any such review. *Aberley v. Vilas*, 294.

CRIMINAL LAW.

1. Under the constitutional authority "to raise and support armies" (*Const.* Art. I. § VIII.), Congress has power to bestow bounties and pensions upon those who may engage in the military service of the United States. *United States v. Fairchild*, 74.
2. This power embraces and authorizes an enactment making it an offense punishable in the national courts, to detain from a military pensioner any portion of a sum collected in his behalf, as his pension. *Id.*
3. Sections 12 and 13 of the pension act of July 4, 1864, 18 *Stat. at L.* 389, limiting the fees of agents and attorneys for making out and causing to be executed the papers necessary under the act, and providing that the receiving of any greater compensation than that prescribed shall be punishable as a misdemeanor, are, therefore, constitutional. *Id.*

CRIMINAL LAW—Continued.

4. Where two persons composing a partnership make and sign, in their partnership name, a false return to the assessor of internal revenue, they may be jointly indicted therefor. *United States v. McGinnis*, 120.
5. Manufacturers of tobacco are not exempt from indictment for violation of the internal revenue laws. The government is not confined to proceedings *in rem*, but may prosecute the individuals concerned, personally. *Id.*
6. Under a statute which punishes one who shall "utter" or "pass" spurious notes, knowing them to be such, with intent to defraud, and which does not in terms require that they be uttered as true or genuine (Act of June 30, 1864, 13 *Stat. at L.* 221, § 10), a defendant may be convicted of *uttering* or passing, upon proof that he *sold* and delivered the notes as spurious notes to another person with intent that they should be passed upon the public as genuine. *United States v. Nelson*, 135.
7. The words "uttering" and "passing," used of notes, do not necessarily import that they are transferred as genuine; the terms include any delivery of a note to another for value, with intent that it shall be put into circulation as money. *Id.*
8. The fact that other provisions of statute exist which expressly provide a punishment for *selling* spurious notes, does not prevent convicting a defendant under an indictment for *passing, uttering, and publishing* such notes, upon proof that he sold them as spurious, with intent that the purchaser should cause them to be put in circulation as genuine. *Id.*
9. To authorize a conviction under a penal statute prescribing a punishment for "willfully" removing an official seal from property which has been sealed up by officers of the customs, it must appear that the defendant not only intended to remove the seal, but that he had at the time a knowledge of its character. One who removes such a seal in ignorance of its character, and in the honest execution of a supposed duty in the care and transportation of the property, is not liable to punishment under the statute, for the reason that he cannot be deemed to have acted *willfully*. *United States v. Three Railroad Cars*, 196.
10. The provisions of section 2 of the act of March 31, 1868, which repeal sections 94 and 95 of the internal revenue law of June 30, 1864, and acts amendatory thereof, do not operate to preserve prosecutions commenced but not carried to judgment before the repeal took effect. *United States v. Finlay*, 264.
11. Where the statute declaring an offense and its punishment is repealed, without a provision saving pending prosecutions, an

CRIMINAL LAW—Continued.

indictment previously found, but not yet tried, should be quashed on motion. There is no longer an offense; and no one can be punished for what is not an offense at the time of punishment. *Ib.*

12. Indians, though belonging to a tribe which maintains the tribal organization, but occupying a Reservation *within* the limits of a State, if there is no valid statute of Congress or treaty to the contrary, are amenable to State laws for murder or other offenses against such laws committed by them off the Reservation and within the limits of the State. *United States v. Sa-coo-da-cot*, 377.
13. *Query*,—whether the United States courts have jurisdiction, under such circumstances, of offenses committed by Indians upon the Reservation? *Ib.*
14. The court in a capital case against Indians, though neither party asked it, and both demanded judgment, arrested judgment, *on its own motion*, for want of jurisdiction over the offense charged in the indictment; but, instead of at once ordering the discharge of the Indians, the court made a special order for turning them over to the State authorities. *Ib.*
15. An offense against the laws of the United States, which is of a character not capital or infamous, may be prosecuted in the courts of the United States, by an information, according to the course of the common law. *United States v. Shepard*, 431.
16. The proper course of proceeding in issuing a criminal information, explained. *Ib.*
17. Upon trial of an indictment for issuing instruments without stamping them as required by law, proof of issuing an instrument unstamped which by law should have been stamped, is sufficient, in the first instance, to warrant a conviction. The jury are to presume that the defendant knew the requirements of the law and intended to evade it, in the absence of some explanation from him. *United States v. Learned*, 433.

PRACTICE, 21-25; COURTS, 14.

DAMAGES.

1. In actions for false imprisonment exemplary damages are only given where it appears that the wrong of which the plaintiff complains was done with an evil intention, or from a bad motive. Where it appears that the arrest of the plaintiff was made in the course of what the defendants supposed to be their duty as public officers, and without malice, and from good mo-

DAMAGES—Continued.

- tives, only compensatory damages should be given. *McCall v. McDowell*, 212.
2. A military officer who orders the arrest and confinement of an individual is bound to see that his subordinates, to whom the execution of the order is entrusted, use no unnecessary severity or cruelty in carrying it into execution; and he is liable in damages for oppression or undue harshness practiced by them through his neglect to superintend the course of his subordinates. *Ib.*
 3. Although mere words will not *justify* an assault and battery or a false imprisonment, yet in an action for imprisoning the plaintiff without cause, seditious language used by him, of a gross and violent character, and which influenced the defendant to order his arrest, may be proved in mitigation of damages. *Ib.*
 4. Where, in a collision case, the evidence is so conflicting or uncertain that the court cannot determine upon which vessel the real cause of the collision should be charged, the damages should be divided between the colliding vessels. *The Comet*, 451.
 5. The rules and authorities governing the apportionment of damages for collision, in cases of mutual fault, inscrutable fault, and inevitable accident, elaborately reviewed. *Ib.*

DEED.

Although inadequacy of price, standing alone, is not enough to warrant a court of equity in setting aside an executed conveyance, yet, where there is inadequacy of price so gross that common judgment revolts at it, a court of equity will lay hold of the slightest additional circumstances of fraud or oppression, as a ground for declaring the transaction void. *Holmes v. Holmes*, 525.

DEFINITIONS.**DRAMATIC COMPOSITION; SUITED FOR PUBLIC REPRESENTATION.—**

The act of August 18, 1856, 11 *Stat. at L.* 138,—declaring that any copyright granted to the author or proprietor of any dramatic composition designed or suited for public representation, shall be deemed to confer the sole right of representation,—does not extend so far as to protect mere spectacles or arrangements of scenic effects, having no literary character. An exhibition, spectacle, or scene, is not a “dramatic composition.” *Martinetti v. Maguire*, 356.

Nor does the act above mentioned extend so far as to protect a composition of an immoral or indecent character. Such compo-

DOWER.

Various circumstances relied upon to establish or raise a presumption of marriage in support of a bill to enforce a claim to dower, examined; and held insufficient to support the claim. *Holmes v. Holmes*, 535.

DUTIES.

1. To warrant a forfeiture of property, under the last clause of section 5 of the act of June 27, 1864, for the unauthorized removal therefrom of a custom-house seal, affixed pursuant to other sections of the act, proof must be made that the removal was *willful*, in the same manner as would be necessary to sustain a conviction and punishment of the offender under the previous clause of the section. *United States v. Three Railroad Cars*, 196.
2. Under section 89 of the duties collection act of 1799,—which allows goods seized for non-payment of duties to be appraised, and delivered to the owner upon his giving a bond for the payment of the appraised value, &c.,—the bond must be for the actual cash value of the property, at the time and place of seizure, without any deduction for duties paid. This rule applies equally, whether the property has been seized in warehouse or in the hands of the importer. *United States v. Twelve thousand three hundred and forty-seven bags of Sugar*, 407.
3. Under section 89 of the duties collection act of 1799,—which allows goods seized for non-payment of duties to be appraised, and delivered to the owner upon his giving a bond for the payment of the appraised value and producing a certificate that the duties have been paid or secured,—the *certificate* should show payment of all burdens or taxes imposed upon the property by the United States as the condition of allowing it to be imported; including any sum imposed under the act of March 3, 1865, authorizing an additional sum of twenty per cent. *ad valorem* to be levied in cases where the appraised value shall exceed ten per cent. more than the value at which the goods were entered. *United States v. Three Horses*, 426.
4. The *bond* to be given under section 89 of the act of 1799, should be for the actual cash value of the property at the time and place of seizure, without deduction for duties paid, where the property has been seized in the hands of the importer. *Id.*
5. *It seems*, that, where the goods have been seized in *warehouse*, the duties may be deducted, in determining the amount for which the claimant must give bond. *Id.*

EMINENT DOMAIN.

Private property cannot be taken for public use until compensation is actually made. It is not enough that a provision is made by law for ascertaining and making compensation afterwards. *Avery v. Fox*, 246.

INJUNCTION, 5; NAVIGATION, 8-10.

EVIDENCE.

1. A vessel is not liable to forfeiture for every apparent violation of a revenue law, although imposing forfeiture as the punishment for a breach of its provisions. Evidence of a violation throws the burden of proof upon the claimant to show innocence. But accidental mistakes may be explained; and the existence of an intent to defraud the revenue may be subject of inquiry, and the claimant may show the act complained of to have been innocent. *The Governor Cushman*, 14.
2. The courts of the United States will take judicial notice of the existence of the civil war of 1861-'65; and of the facts of public history connected with its origin and progress. *Cuyler v. Ferrill*, 169.
3. It is not necessary, in order to support an application by a supervisor of internal revenue, for an attachment to compel a person liable to taxation to appear and testify and produce his books, &c., that the supervisor should appear to have acted, in issuing the summons, under any special instructions from the commissioner of internal revenue. The supervisor must obey any special instructions which are shown to have been given. But in the absence of proof of instructions, it will be presumed that his acts have been in pursuance of his official duty. *Meador's Case*, 817.
4. Upon trial of an indictment for issuing instruments without stamping them as required by law, proof of issuing an instrument unstamped which by law should have been stamped, is sufficient, in the first instance, to warrant a conviction. The jury are to presume that the defendant knew the requirements of the law and intended to evade it, in the absence of some explanation from him. *United States v. Learned*, 488.
5. It is not necessary, in order to establish that a particular mode of proceeding has been adopted by a United States court, that there should be found a written rule declaring such adoption. The practice of a court may be established without the existence of a positive written rule. *United States v. Stevenson*, 495.

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FALSE IMPRISONMENT.

DAMAGES, 1-3.

FORFEITURE.

1. The fact that prohibited articles are secretly introduced on board a vessel by persons employed as hands (such as a cook or waiter) at the will of the master merely, does not necessarily expose the vessel to forfeiture under a statute (such as the act of March 2, 1799, § 108, 1 *Stat. at L.* 701), which imposes, as the punishment for importing specified articles, a forfeiture of the ship in which they have been imported; provided the articles in question are brought on board without the knowledge or consent of the master or owners, and in defiance of reasonable regulations prescribed on board the ship for securing conformity to the law. *The Governor Cushman*, 14.
2. If the master connives at such acts of the hands on board the vessel, she may be rendered liable to forfeiture; as the owners are liable for the acts of the master in the discharge of his duties as such. But they are not necessarily liable for the acts of all persons employed by the master on board the ship. *Id.*
3. A vessel is not liable to forfeiture for every apparent violation of a revenue law, although the law imposes forfeiture as the punishment for a breach of its provisions. Evidence of a violation throws the burden of proof upon the claimant to show innocence. But accidental mistakes may be explained; and the existence of an intent to defraud the revenue may be subject of inquiry, and the claimant may show the act complained of to have been accidental or innocent. *Id.*
4. A *bona fide* purchaser of personal property, which has been forfeited to the government by previous acts of the former owner, is not protected against the title of the government. The right of the government founded on the forfeiture must prevail over any title acquired by purchase subsequent to the forfeiture. *United States v. Fifty-six barrels of Whiskey*, 93.
5. The general rule in respect to the *time* when a forfeiture takes effect, is, that when a statute denounces a forfeiture of property as the punishment of a violation of law, if the denunciation is expressed in direct terms and not in the alternative, the forfeiture takes place at the time when the offense was committed, and operates at that time as a statutory transfer of the right of property to the government. *Id.*
6. No distinction exists, in this respect, between the operation of a statute which declares that, for a specified offense, *the property*

FORFEITURE—Continued.

- designated *shall be forfeited*, and one which declares that *the offender shall forfeit* the property. *Id.*
7. Where one has purchased property,—such as spirits,—which had been previously forfeited to the government, has mixed it (although in good faith) with other property free from forfeiture, so that it can no longer be identified, the courts, in enforcing the forfeiture, cannot make any division of the aggregate between the claimant and the government. All the forfeited property must be delivered to the government; and if this, by reason of the mixture, necessitates the delivery of the other, the claimant must bear the loss. *Id.*
 8. After a judgment in proceedings for a fine, penalty, or forfeiture has been rendered, by which a moiety thereof has become vested in an informer or other individual, it is not within the power of the president by a pardon to remit or release the moiety thus accruing to the individual. His power is limited to a remission of the share of the government only. *So held*, where the conviction took place before the enactment of section 9 of the Internal Revenue Act of July 18, 1866, 14 *Stat. at L.* 146. *United States v. Harris*, 110.
 9. *It seems*, that *before* judgment, where the prosecution is wholly in the name of the United States, the president has complete power over the whole case. *Id.*
 10. To warrant a forfeiture of property, under the last clause of section 5 of the act of June 27, 1864, for the unauthorized removal therefrom of a custom-house seal, affixed pursuant to other sections of the act, proof must be made that the removal was *willful*, in the same manner as would be necessary to sustain a conviction and punishment of the offender under the previous clause of the section. *United States v. Three Railroad Cars*, 196.
 11. The defendant in an information to enforce a forfeiture under the internal revenue laws, may take advantage of the fact that the prosecution was not instituted within the time limited by law for commencing it, under the general issue. He is not required to plead specially. *United States v. Six Fermenting Tubs*, 268.
 12. In general, where an action for the recovery of a penalty or a proceeding to enforce a forfeiture is pending at the time of the repeal of the statute imposing such penalty or forfeiture, or is instituted afterwards, the repeal is a bar to the action or proceeding, unless the repealing act contains a saving clause. *Id.*
 13. The internal revenue act of 1866, in repealing the act of 1864, contains a saving clause (section 70) which operates to preserve

FORFEITURE—Continued.

and continue demands which vested, and proceedings which were commenced under the act of 1864. *Id.*

14. To warrant a forfeiture of tools, implements, instruments, or other personal property, under section 48 of the internal revenue act of 1864, 18 *Stat. at L.* 240, as amended by the act of 1866, 14 *Id.* 111, upon the ground that they are found upon premises where an illicit manufacture is carried on, it should appear that such property was employed, or intended to be used in such manufacture, or was in some way connected with it. *United States v. Thirty-three barrels of Spirits*, 311.

SEAMEN.

HABEAS CORPUS.

1. Where it appears by the return to a writ of *habeas corpus*, issued by a State tribunal, that the respondent holds the petitioner under authority, or color of authority from the United States, the State tribunal or officer has no jurisdiction to proceed further, but must discharge the writ. *Farrand's Case*, 140.
2. The question whether such authority is valid cannot be examined in a State court; but is within the exclusive jurisdiction of the tribunals of the United States. *Id.*
3. A commander in the army of the United States made return to a writ of *habeas corpus* issued by a State court, showing that he held the petitioner as a recruit in the army, and pursuant to laws of the United States regulating enlistments. The State court examined the validity of the enlistment, determined it to be invalid, and directed the recruit to be discharged. The officer refused to discharge him, and the State court committed the officer for contempt. *Held*, by the district court, on a *habeas corpus* sued out by the commander, that the State court exceeded its jurisdiction in examining the validity of the enlistment; that it had no power to proceed beyond ascertaining that the officer held the recruit by color of authority from the United States; and that the officer, in detaining the recruit notwithstanding the order of discharge by the State court, acted in pursuance of a law of the United States, and being imprisoned therefor by the State court, was himself entitled to be discharged by virtue of the act of March 2, 1838. *Id.*
4. It is competent to Congress to pass a law authorizing the president to suspend the privilege of the writ of *habeas corpus*; and this power extends to enable them to pass laws indemnifying or protecting officers against actions for arrests previously made. *McCall v. McDowell*, 212.

HABEAS CORPUS—*Continued.*

5. But the president has no authority to suspend the writ of *habeas corpus*, except as authorized and directed by Congress. *Ib.*

HUSBAND AND WIFE.

MARRIAGE.

IMPRISONMENT.

1. The extent to which State laws abolishing or restricting imprisonment for debt, are adopted for the guidance of the United States courts,—explained. *United States v. Walsh*, 66.
2. *It seems*, that a State law forbidding "imprisonment for debt, except in cases of fraud," should be construed as meaning to prohibit imprisonment *for debt arising upon contract*, except in cases of fraud; and should not be deemed to extend to imprisonment upon a judgment for a statute penalty. *Ib.*
3. The obligation of one who has manufactured or sold goods in violation of a revenue law requiring him to pay a duty thereon, to pay a penalty imposed by the law for such violation, is a case of fraud, and within the exception in a State law prohibiting imprisonment for debt, except in cases of *fraud*. This penalty is incurred by acts which constitute a fraud upon the United States. *Ib.*

DAMAGES, 1-3.

INDIANS.

1. Indians, though belonging to a tribe which maintains the tribal organization, but occupying a Reservation *within* the limits of a State, if there is no valid statute of Congress or treaty to the contrary, are amenable to State laws, for murder or other offenses against such laws committed by them off the Reservation and within the limits of the State. *United States v. Saco-da-cot*, 377.
2. *Query*,—whether the United States courts have jurisdiction, under such circumstances, of offenses committed by Indians *upon* the Reservation? *Ib.*
3. The relations which Indians, residing within State limits, sustain to the State and the United States, and their respective laws,—discussed, by DILLON, Circuit Judge. *Ib.*

INDICTMENT.

1. It is not necessary to aver, in an indictment, the existence or the provisions of a public statute upon which the prosecution is founded. *United States v. Rhodes*, 28.

INDICTMENT—*Continued.*

2. An indictment for burglary in entering the house of T. in Kentucky, averred that T. was of African descent, and a citizen; and that she was, by the laws of Kentucky, denied the right to testify against the defendants, they being white. There was a public statute of Kentucky, enabling white persons under similar circumstances, to testify. *Held*, that the indictment was sufficient, and that the circuit court might take jurisdiction under section 8 of the act of April 9, 1866, 14 *Stat. at L.* 37, known as the "civil rights" bill, notwithstanding there was no averment of the statute of Kentucky. The circuit court should take judicial notice of such statute, and the indictment should be construed in the same manner as if the statute were averred. *Ib.*
3. Where a motion to quash an indictment is founded upon the allegation that no evidence whatever of defendant's guilt was adduced in support of the application for a warrant for his arrest, the court may inquire into this allegation, and, if it is established, quash the indictment; though they cannot inquire into the sufficiency of such evidence, if any was produced. *United States v. Shepard*, 481.

INFORMATION.

1. An information prosecuted in a district court must be regarded and treated as a common law proceeding; except in that aspect a district court can have no jurisdiction of it. *United States v. Stevenson*, 495.
2. Under the practice which has prevailed in the district court for the southern district of New York, an attachment may be issued in aid of a common law information prosecuted by the United States. *Ib.*

INJUNCTION.

1. The circuit courts have power, in a proper case, to grant an injunction against threatened proceedings of a collector of internal revenue, to collect a tax which is not authorized by act of Congress. *Georgia v. Atkins*, 22.
2. Upon a bill to restrain an infringement of a patent, if it is shown that defendants have formerly been engaged in infringing, the mere fact that since the commencement of the suit they have ceased to do so, and do not threaten to renew their sales, is not an answer to an application for a preliminary injunction to restrain the continuance or renewal of such infringement. *Peterson v. Crowell*, 89.

INJUNCTION—*Continued.*

3. A district court has not power to enjoin the prosecution of an action in a State court. *Campbell's Case*, 185.
4. The bankrupt act of 1867 does not confer such power, even in aid of proceedings in bankruptcy; nor does it impair the rule prescribed by the act of March 8, 1793, forbidding injunctions to stay proceedings in courts of a State. *Ib.*
5. Although the courts cannot directly restrain the government of the United States, nor the action of the president as the executive power, nor that of Congress as the legislative department; yet when Congress makes an appropriation for a public improvement, and commits the execution of the work and the expenditure of the money to one of the departments, which in turn employs agents to carry forward the work, neither such department nor its agents will be exempt from the restraining power of the courts, if either seek to execute the law in an unconstitutional manner;—as, by taking private property against the consent of the owner and without compensation. *Avery v. Fox*, 246.
6. Where the exhibitor of a dramatic composition made no sufficient proof of title thereto by authorship or purchase from an author, and the facts indicated that his play was a colorable imitation of the performance which he sought to restrain, his application for a provisional injunction was refused. *Martinetti v. Maguire*, 356.

CONSTITUTIONAL LAW, 18-22.

INSOLVENCY.

DEFINITIONS.

INSURANCE.

Under a policy of marine insurance against "perils of the lakes, seas, rivers, &c.;" also against "all other perils and misfortunes, &c.;" also against "the usual risk of lighterage at O.," the assured shipped cattle to O. At that port, as the vessel was prevented by a bar from landing, the cattle were put on board a lighter to be landed. They were tied by ropes to a chain running through the lighter, fore and aft. This was the usual mode of landing cattle at that port. While the lighter was proceeding in, the cattle became frightened, broke a part of the chain loose, rushed overboard and were drowned.

Held, 1. That this loss was within the insurance of "perils of the seas, &c."

INSURANCE—Continued.

2. That even if it were not covered by that provision, it was embraced within the general assurance against "other perils and misfortunes," and that against "the usual risk of lighterage at O." *Anthony v. Aetna Insurance Co.*, 843.

INTERNAL REVENUE.

1. The obligation of one who has manufactured or sold goods in violation of a revenue law requiring him to pay a duty thereon, to pay a penalty imposed by the law for such violation, is a case of fraud, and within the exception in a State law prohibiting imprisonment for debt, except in cases of *fraud*. This penalty is incurred by acts which constitute a fraud upon the United States. *United States v. Walsh*, 60.
2. A stipulation in a mortgage by a corporation, requiring payment "without any deduction, &c., for or in respect of any taxes, charges, or assessments whatsoever," does not prevent the corporation from paying the income tax chargeable against the holder of the mortgage in respect to the interest accruing to him from time to time upon the mortgage, and deducting the amount paid from such interest. *Haight v. Pittsburgh, &c. R. R. Co.*, 81.
3. Where two persons composing a partnership make and sign, in their partnership name, a false return to the assessor of internal revenue, they may be jointly indicted therefor. *United States v. McGinnis*, 120.
4. Manufacturers of tobacco are not exempt from indictment for violation of the internal revenue laws. The government is not confined to proceedings *in rem*, but may prosecute the individuals concerned, personally. *Id.*
5. In general, where an action for the recovery of a penalty or a proceeding to enforce a forfeiture is pending at the time of the repeal of the statute imposing such penalty or forfeiture, or is instituted afterwards, the repeal is a bar to the action or proceeding, unless the repealing act contains a saving clause. *United States v. Six Fermenting Tubs*, 268.
6. The internal revenue act of 1866, in repealing the act of 1864, contains a saving clause (section 70) which operates to preserve and continue demands which vested, and proceedings which were commenced under the act of 1864. *Id.*
7. A scheme for the disposal of town lots, by the terms of which a number of lots are sold, and others are reserved to be distributed by lot among the purchasers of the first portion, so that the chance of obtaining one of the reserved or prize lots forms

INTERNAL REVENUE—*Continued.*

- a part of the inducement or consideration for which each purchaser pays the price agreed on for the lot sold to him, is a "lottery" within the operation of a law imposing a tax on lotteries, for purposes of revenue. *United States v. Olney*, 275.
8. A revenue law ought to liberally construed, with a view to attain the object for which it is enacted,—viz: the raising a revenue. *Id.*
 9. To warrant a forfeiture of tools, implements, instruments, or other personal property, under section 48 of the internal revenue act of 1864, 13 *Stat. at L.* 240, as amended by the act of 1866, 14 *Id.* 111, upon the ground that they are found upon premises where an illicit manufacture is carried on, it should appear that such property was employed, or intended to be used in such manufacture, or was in some way connected with it. *United States v. Thirty-three barrels of Spirits*, 811.
 10. It is not necessary, in order to support an application by a supervisor of internal revenue, for an attachment to compel a person liable to taxation to appear and testify and produce his books, &c. that the supervisor should appear to have acted, in issuing the summons, under any special instructions from the commissioner of internal revenue. The supervisor must obey any special instructions which are shown to have been given. But in the absence of proof of instructions, it will be presumed that his acts have been in pursuance of his official duty. *Meador's Case*, 317.
 11. The extent of the powers of a supervisor of internal revenue to order persons chargeable with a tax to appear before him for examination, and to produce books and papers; and the powers of a district court to punish disobedience to such order as a contempt,—explained. *Id.*
 12. Under the internal revenue laws of July 13, 1866, § 94, and March 3, 1865, § 61, when oil is transported from one district to another, under a transportation bond, the duty is assessed and paid on any *deficiency* or *reduction* of the number of gallons received at the warehouse, from the number of gallons as stated in the bond at the place of shipment, less the per centum for leakage allowed by the treasury department. And this is so, although there has been an absolute loss by solar heat, or the action of the elements. *United States v. Barrows*, 851.
 13. The law has provided a rule regulating the allowance for leakage, from which, however great the hardship, it is not the province of the courts to depart. *Id.*
 14. The provisions of section 2 of the act of March 31, 1868, which

INTERNAL REVENUE—*Continued.*

repeal sections 94 and 95 of the internal revenue law of June 30, 1864, and acts amendatory thereof, do not operate to preserve prosecutions commenced but not carried to judgment before the repeal took effect. *United States v. Finlay*, 864.

15. One whose occupation is to sell agricultural produce in public market, is not exempted from the tax imposed by the internal revenue law of 1866 upon "produce brokers," by the fact that the produce sold is not purchased by him for sale, nor sold as agent for another, but is raised by himself upon his farm. *United States v. Simons*, 470.
16. An instrument in the following form,—“Due the bearer or” [naming a payee] ——— “dollars in merchandise out of our store,” signed on behalf of an employer, by his bookkeeper, under his general instructions, and delivered to a person employed to enable him or any one to whom he may transfer it to obtain the goods, in payment for services rendered, is a contract, and requires a five-cent stamp. *United States v. Learned*, 488.

CORPORATIONS, 4; COURTS, 12, 23.

JUDGMENT.

1. A judgment and subsequent proceedings, had in a circuit or district court, which are void for want of jurisdiction, may be vacated upon motion in the same court, notwithstanding the expiration of the term at which the judgment was rendered. *Shuford v. Cain*, 302.
2. The effect of a judgment of a United States court, as a lien upon the lands of defendant, cannot be restricted by State statutes, or by the construction placed by the State courts upon such statutes. *Carroll v. Watkins*, 474.
3. A State statute requiring judgments to be enrolled in the county in which the lands to be affected lie, before they can become liens on real property, has no effect upon the lien of a judgment of a court of the United States. Such judgment becomes a lien on lands throughout the district in which it is recovered. *Ib.*

JURISDICTION.

1. Where it appears by the return to a writ of *habeas corpus*, issued by a State tribunal, that the respondent holds the petitioner under authority, or color of authority from the United States, the State tribunal or officer has no jurisdiction to proceed further, but must discharge the writ. *Farrand's Case*, 140.

JURISDICTION—Continued.

2. The question whether such authority is valid cannot be examined in a State court; but is within the exclusive jurisdiction of the tribunals of the United States. *Id.*
3. A commander in the army of the United States made return to a writ of *habeas corpus* issued by a State court, showing that he held the petitioner as a recruit in the army, and pursuant to laws of the United States regulating enlistments. The State court examined the validity of the enlistment, determined it to be invalid, and directed the recruit to be discharged. The officer refused to discharge him, and the State court committed the officer for contempt. *Held*, by the district court, on a *habeas corpus* sued out by the commander, that the State court exceeded its jurisdiction in examining the validity of the enlistment; that it had no power to proceed beyond ascertaining that the officer held the recruit by color of authority from the United States; and that the officer, in detaining the recruit notwithstanding the order of discharge from the State court, acted in pursuance of a law of the United States, and being imprisoned therefor by the State court, was himself entitled to be discharged by virtue of the act of March 2, 1833. *Id.*

CARRIERS, 5; COURTS, 1, 2; JUDGMENT, 1.

LEGISLATION.

CORPORATIONS, 1-3.

LIEN.

BANKRUPTCY, 1-3; JUDGMENT, 2, 3; SHIPPING, 3, 5-7.

LIMITATIONS OF ACTIONS.

PLEADING.

LOTTERY.

DEFINITIONS.

MARRIAGE.

1. The existing laws of California (*Hitt. Laws of Cal.* 4, 466), and of Oregon (*Oreg. Code*, 783, 785) require, in order to constitute a marriage, that the consent of the parties to become husband and wife should be avowed before a person authorized to solemnize marriages, and in the presence of two witnesses. Without the observance of all these formalities, the marriage relation cannot be created in either of those States. *Holmes v. Holmes*, 525.

MARRIAGE—Continued.

2. Citizens of a State whose laws impose restrictions upon the mode of celebrating a marriage, cannot purposely go to a place beyond its jurisdiction, and not within the jurisdiction of another State,—as, for instance, *at sea*,—and there contract a marriage in a manner contrary to the laws of the State of their residence, and afterwards have such marriage sustained by the courts within it. Such an attempt to be joined in marriage should be deemed a fraudulent evasion of the laws to which the parties owe obedience, and ought not to be held valid. *Ib.*
3. *Query*,—whether, in the absence of any statute declaring the mode of contracting a marriage, a contract to marry in the future, followed by copulation, can be deemed to amount to a marriage in fact? *Ib.*
4. Various circumstances relied upon to establish or raise a presumption of marriage in support of a bill to enforce a claim to dower, examined; and held insufficient to support the claim. *Ib.*

MASTER.

SHIPPING, 1-3.

MORTGAGE.

1. A stipulation in a mortgage by a corporation, requiring payment “without any deduction, &c., for or in respect of any taxes, charges, or assessments whatsoever,” does not prevent the corporation from paying the income tax chargeable against the holder of the mortgage in respect to the interest accruing to him from time to time upon the mortgage, and deducting the amount paid from such interest. *Haight v. Pittsburgh, &c. R. R. Co.*, 81.
2. When an insolvent debtor gives a mortgage in favor of one creditor, with intent to secure to him a preference over other creditors, and such creditor has, at the time, reasonable cause to believe the debtor insolvent, the mortgage is void, by the provisions of the bankrupt law of 1867. *Driggs v. Moore*, 440.
3. If, from the circumstances under which the mortgage was given, it must necessarily have operated as a preference, the creditor will not be heard to say, in support of the transaction, that the debtor did not intend to create one. *Ib.*

MOTIONS.

PRACTICE, 13, 14.

NAVIGATION.

1. The provision of the ordinance of 1787, declaring the navigable waters leading into the Mississippi and the Saint Lawrence "common highways and forever free," does not restrict the powers of Congress, or of the States, to legislate respecting those waters. *Woodman v. Kilbourn Manufg. Co.*, 158.
2. In the absence of any conflicting enactment by Congress relative to the use of a navigable stream, the State within which such stream lies has power to legislate respecting it. *Ib.*
3. The right of the public to use a navigable river as a highway, is paramount to every other use of the water; but it does not exclude or forbid the legislature of the State (where no conflicting enactment by Congress exists) from authorizing the construction of public improvements upon the stream, although they may involve a partial obstruction or inconsiderable detention to navigation. *Ib.*
4. Under the constitution and laws of Wisconsin, any obstruction to the use of a navigable stream by the public for uses of navigation, which is erected without a constitutional legislative authority, is a nuisance, and liable to be abated either at the suit of an individual or at the instance of the State. *Ib.*
5. The owner of land bordering upon a stream, although navigable, in which the tide does not ebb and flow, is presumed to be the owner of the land beneath the water to the center line of the stream. *Avery v. Fox*, 246.
6. Such riparian proprietor has also a right to use the water of the stream, in its flow, in any manner not inconsistent with the rights of others in it. *Ib.*
7. But the public have the right to use all navigable streams as highways; and the owner of the bed of such a stream has no right, as such, in the waters thereof, which can authorize him to impede or obstruct navigation upon it. The right of the public, for purposes of navigation, is paramount to that of the riparian proprietor. *Ib.*
8. The government of a State may authorize alterations to be made in the course, width, &c., of navigable streams, with a view to afford greater facilities for navigation; and for this purpose may take the property of a riparian owner, upon complying with the constitutional requirement to make compensation therefor. *Ib.*
9. The government of the United States may authorize similar alterations in navigable streams, for the purpose of affording increased facilities for navigation between the States; and for this purpose may take the property of a riparian owner. But they

NAVIGATION—*Continued.*

can only take such property upon making or providing for just compensation. *Id.*

10. If an alteration in the course of a stream, by diverting it from its natural channel to an artificial one, for the purpose of improving navigation, results in depriving the riparian owner of the use of the stream which he is employing advantageously as an incident to his land, this is taking the private property of such owner, in the use of the water, for a public use; and he is entitled to compensation. *Id.*

NEGROES.

1. Section 1 of the fourteenth amendment to the constitution applies to whites as well as colored people, as citizens of the United States; and is intended to protect them in their privileges and immunities as such, against the action, as well of their own State, as of other States in which they may happen to be. *Live Stock, &c. Association v. Crescent City, &c. Co.*, 388.
2. These privileges and immunities do not consist merely in being placed on an equality with others; but embrace all the fundamental rights of a citizen of the United States as such. *Id.*
3. One of these fundamental rights is the right to pursue any lawful employment in a lawful manner; or, in other words, the right to choose one's own pursuit, subject only to constitutional regulations and restrictions. *Id.*

APPRENTICESHIP; CITIZENS; COURTS, 13, 14.

NOTICE.

Where a purchaser has notice of the facts upon which an adverse claim depends, he is deemed to have notice of the consequences of those facts. *Cuyler v. Ferrill*, 169.

OFFICERS.

1. A military officer who orders the arrest and confinement of an individual is bound to see that his subordinates, to whom the execution of the order is entrusted, use no unnecessary severity or cruelty in carrying it into execution; and he is liable in damages for oppression or undue harshness practiced by them through his neglect to superintend the course of his subordinates. *McCall v. McDowell*, 212.
2. Except in a plain case of excess of authority, where at first blush it is palpable to the commonest understanding that the order given is illegal, a military subordinate should be held ex-

OFFICERS—*Continued.*

- cused, in law, for acts done in obedience to the orders of his commander. *Ib.*
3. This rule is equally applicable whether the legality of the order depends upon a question of fact or upon a question of law. *Ib.*
 4. In actions for false imprisonment exemplary damages are only given where it appears that the wrong of which the plaintiff complains was done with an evil intention, or from a bad motive. Where it appears that the arrest of the plaintiff was made in the course of what the defendants supposed to be their duty as public officers, and without malice, and from good motives, only compensatory damages should be given. *Ib.*
 5. Although the courts cannot directly restrain the government of the United States, nor the action of the president as the executive power, nor that of Congress as the legislative department; yet when Congress makes an appropriation for a public improvement, and commits the execution of the work and the expenditure of the money to one of the departments, which in turn employs agents to carry forward the work, neither such department nor its agents will be exempt from the restraining power of the courts, if either seek to execute the law in an unconstitutional manner;—as, by taking private property against the consent of the owner and without compensation. *Acery v. Fox*, 246.

ORDINANCE OF 1787.

CONSTITUTIONAL LAW, 7.

PARDONS.

1. After a judgment in proceedings for a fine, penalty, or forfeiture has been rendered, by which a moiety thereof has become vested in an informer or other individual, it is not within the power of the president by a pardon to remit or release the moiety thus accruing to the individual. His power is limited to a remission of the share of the government only. *So held*, where the conviction took place before the enactment of section 9 of the internal revenue act of July 13, 1866, 14 *Stat. at L.* 146. *United States v. Harris*, 110.
2. *It seems*, that *before* judgment, where the prosecution is wholly in the name of the United States, the president has complete power over the whole case. *Ib.*

PARTITION.

1. During the civil war of 1861-'65, some of the devisees of lands lying in Georgia, commenced proceedings for a partition of the

PARTITION—Continued.

lands, in one of the courts of Georgia. A partition was ordered and a sale made. At the time when the proceedings were pending one of the devisees was in the discharge of his duties as a surgeon in the United States army; and was prevented from communication with the State of Georgia, by the war. *Held*, that the proceedings of the Georgia court were void, as against such devisee, for want of jurisdiction. *Cuyler v. Ferrill*, 169.

2. The rule asserted by some authorities, that a bill in equity for partition should be dismissed where the title is denied, or an adverse possession asserted, and the parties left to establish their rights at law,—questioned. *Id.*

PARTNERSHIP.

Where two persons composing a partnership make and sign, in their partnership name, a false return to the assessor of internal revenue, they may be jointly indicted therefor. *United States v. McGinnis*, 120.

PATENTS.

1. Upon a bill to restrain an infringement of a patent, if it is shown that defendants have formerly been engaged in infringing, the mere fact that since the commencement of the suit they have ceased to do so, and do not threaten to renew their sales, is not an answer to an application for a preliminary injunction to restrain the continuance or renewal of such infringement. *Potter v. Crowell*, 89.
2. An assignment of an interest in an invention and of letters patent therefor, made during the original term, carries no interest in a subsequently extended term, unless it contains a provision to that effect. *Jenkins v. Nicolson Pavement Co.*, 567.
3. An assignment which grants "all the right, title and interest which I (the assignor) have in said invention and letters patent" . . . "to be held and enjoyed by" (naming the assignee, &c.) "to the full end of the term for which the said letters are or may be granted," does not operate to pass a subsequent extension. The words "for which said letters *may be granted*," may pass a subsequent reissue of the letters for the residue of the original term, but cannot be construed as including an extended term. *Id.*

PAYMENT.

1. The fact that, during the civil war of 1861-'65, a citizen of one of the self-styled Confederate States, being indebted to a citizen

PAYMENT—Continued.

- of a loyal State, was compelled to pay, and did pay the amount of the demand into the treasury of the Confederate State, under a statute of that State for the sequestration of estates of alien enemies, forms no defense to an action brought by the creditor, in a court of the United States, since the war was terminated, to recover the demand. *Shortridge v. Macon*, 58.
2. The acts of citizens of the Confederate States, before and during the civil war, setting aside the previous State governments, uniting in the confederation, and making war upon the United States, were never operative to accomplish a separation of such States from the Union; nor can they discharge a citizen of one of those States from any duty, or relieve him from any responsibility. *Ib.*
 3. The levying war against the United States, committed by the citizens of the Confederate States, was treason against the United States. Neither the pretended acts of secession, nor the magnitude or formidable character of the war, could modify the offense, or constitute a Confederate State government *de facto*, so as to create civil rights which could outlast the war. *Ib.*
 4. A payment of purchase money made in "Confederate notes," although made while the civil war of 1861-'65 was still pending, and in one of the so-called Confederate States, where such notes were then the usual currency, and although the notes were accepted as money, cannot constitute the party making the payment a *bona fide* purchaser for value, so as to entitle him to equitable protection or relief in the circuit court. *Cuyler v. Ferrill*, 169.

PENSIONS.

CONSTITUTIONAL LAW, 3-5.

PLEADING.

The defendant in an information to enforce a forfeiture under the internal revenue laws, may take advantage of the fact that the prosecution was not instituted within the time limited by law for commencing it, under the general issue. He is not required to plead specially. *United States v. Six Fermenting Tubs*, 268.

PRACTICE.**GENERALLY.**

1. The commingling of law and equity in the same proceeding, which is allowed in the State courts of Georgia, is unknown in the national courts held within that State. These sit dis-

PRACTICE—Continued.

tinctly as courts of law, or as courts of equity. *Shuford v. Cain*, 802.

3. It is not necessary, in order to establish that a particular mode of proceeding has been adopted by a United States court, that there should be found a written rule declaring such adoption. The practice of a court may be established without the existence of a positive written rule. *United States v. Stevenson*, 495.

AMENDMENT.

3. The district courts have an undoubted power, in the exercise of a sound judicial discretion, to permit a libel to be amended. *United States v. One hundred and twenty-three casks of Distilled Spirits*, 578.
4. If an application to amend a libel proposes to introduce a new cause of action, it is usual to allow the amendment when the new cause of action corresponds in character and is kindred in nature to that presented in the original libel; but if the amendment introduces a new substantive cause of action and a new charge against the defendant, it is disallowed. *Id.*
5. A libel of information was filed under a section of statute imposing punishment for disposing of property subject to internal revenue tax, in fraud of the revenue laws. The government applied for leave to amend by adding a count founded on another section of the statute, which imposed punishment on a manufacturer, &c., who should neglect to make returns of his manufactures to the proper revenue officer. *Held*, that this was a substantially new charge, and that the leave must be refused. *Id.*

APPEAL.

6. The objection that the district court has not jurisdiction of a cause of seizure under the laws of impost, navigation, and trade, because it does not appear that the property was seized before the proceeding was commenced, may be urged successfully upon appeal in the circuit court, notwithstanding it was not taken in the district court. *The Fideliter*, 577.

ARREST.

7. A statute providing in general terms that an order of arrest may be issued whenever certain facts appear by *affidavit* is satisfied if the requisite facts appear by a fully verified complaint, and this complaint is laid before the court on applying for the order of arrest. *United States v. Walsh*, 66.
8. A certified copy of an information filed for an offense against the laws of the United States, without copies of some oath or affir-

PRACTICE—Continued.

mation to facts showing probable cause to believe the defendant guilty, does not authorize issuing a warrant of arrest. *United States v. Shepard*, 431.

9. It is not lawful to arrest a person in one district, for an alleged offense against the laws of the United States, and remove him to another district for examination; nor can a district judge authorize such removal. The offender, upon being arrested, is entitled to be taken before the proper officer of the district in which the arrest is made, for examination; and if probable cause is not shown, or if (the case being bailable) he gives bail, he is entitled to be discharged. It is only after a commitment upon the results of such examination that an order can be made to remove him to the district in which the trial is to be had. *Id.*

ATTACHMENT.

10. Under the practice which has prevailed in the district court for the southern district of New York, an attachment may be issued in aid of a common law information prosecuted by the United States. *United States v. Stevenson*, 495.

COSTS.

11. The fact that the deposition of a witness has been taken upon a *dedimus potestatem*, and is on file, forms no objection to the allowance of the traveling fees of such witness, in the taxation of costs, if he attended and was examined in person. *Anderson v. Moe*, 299.
12. Under the fee bill of February 5, 1853, as well as under former laws, the successful party is entitled to tax travel fees of a witness who resides out of the State and more than one hundred miles from the place of trial, and who attends voluntarily, upon mere request. *Id.*

MOTIONS.

13. In modern practice the courts incline to allow a question of regularity in the proceedings in a cause to be raised and determined upon a motion in the cause, instead of requiring the party aggrieved to sue out a writ. *Shuford v. Cain*, 302.
14. A judgment and subsequent proceedings, had in a circuit or district court, which are void for want of jurisdiction, may be vacated upon motion in the same court, notwithstanding the expiration of the term at which the judgment was rendered. *Id.*

PROCESS.

15. Section 1 of the act of May 19, 1828, 4 *Stat. at L.* 278, relative to process of the United States courts, does not apply within States

PRACTICE—*Continued.*

which were members of the Union before September 29, 1789. And the act of May 8, 1792, does not adopt, prospectively, laws which may have since been passed by the States (though it enables the several courts to adopt them), but only adopts those then existing. *United States v. Stevenson*, 495.

16. The forms of process (except style) and modes of proceeding in the United States courts, sitting within the thirteen States which originally composed the Union, in actions at common law, are the same as those which were employed in the supreme courts of the States, respectively, on May 8, 1792; except so far as the United States courts may have prescribed alterations. *Id.*

REMOVAL OF CAUSES.

17. A State court has no power to entertain an appeal or other proceeding to review an order made in such court granting a petition to remove a cause from the State court to a court of the United States; nor can the State court withhold or delay the transfer of the record from its clerk's office to the United States court pending any such review. *Akerly v. Vilas*, 284.
18. An application in a State court for the removal of a cause to a United States court, made after trial and judgment in a State court of original jurisdiction, and judgment of a State court of appellate jurisdiction, which in effect reverses the judgment below and orders a new trial or hearing, is in season, where the application is made under the act of March 2, 1867, 14 *Stat. at L.* 558,—which authorizes the petition to be filed at any time "before the final hearing or trial" of the suit. The reversal and order for a new trial or hearing open the case to litigation the same as if no judgment had ever been rendered. *Id.*
19. A non-resident plaintiff, who has brought an action at law in a State court against a citizen of the State in which the suit is brought and the citizen of another State, the latter of whom voluntarily appears, may, by complying with the act of Congress of March 2, 1867, 14 *Stat. at L.* 558, obtain a removal of the cause, as to all the defendants, to the proper circuit court of the United States. *Sands v. Smith*, 368.
20. The various acts of Congress relating to the removal of causes from the State to the Federal courts, discussed, and their construction and operation explained, by DILLON, Circuit Judge. *Id.*

IN CRIMINAL CASES.

21. Where a motion to quash an indictment is founded upon the

PRACTICE—Continued.

allegation that no evidence whatever of defendant's guilt was adduced in support of the application for a warrant for his arrest, the court may inquire into this allegation, and, if it is established, quash the indictment; though they cannot inquire into the sufficiency of such evidence, if any was produced. *United States v. Shepard*, 481.

22. Criminal proceedings in the courts of the United States are according to the course of the common law; except so far as has been otherwise provided by the constitution or acts of Congress. They are not affected by the laws of the several States. *Ib.*
23. Hence it is not necessary that the names of witnesses for the prosecution should be indorsed on the indictment or information preferred in one of those courts; although such indorsement may be required by statute of the State. *Ib.*
24. An offense against the laws of the United States, which is of a character not capital or infamous, may be prosecuted in the courts of the United States, by an information, according to the course of the common law. *Ib.*
25. The proper course of proceeding in issuing a criminal information, explained. *Ib.*

PROCESS

PRACTICE, 15, 16.

REAL PROPERTY.

The definition of a vested remainder given in *Doe d. Poor v. Considine*, 6 Wall. 458,—viz: "a vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in future,"—approved and applied. *Cuyler v. Ferrill*, 169.

REMOVAL OF CAUSES.

PRACTICE, 17–20.

REVENUE.

DUTIES; INTERNAL REVENUE

SALES.

1. A *bona fide* purchaser of personal property, which has been forfeited to the government by previous acts of the former owner, is not protected against the title of the government. The right of the government founded on the forfeiture must prevail over any title acquired by purchase subsequent to the forfeiture. *United States v. Fifty-six barrels of Whiskey*, 93.

SALES—Continued.

2. Where one who has purchased property,—such as spirits,—which had been previously forfeited to the government, has mixed it (although in good faith) with other property free from forfeiture, so that it can no longer be identified, the courts, in enforcing the forfeiture, cannot make any division of the aggregate between the claimant and the government. All the forfeited property must be delivered to the government; and if this, by reason of the admixture, necessitates the delivery of the other, the claimant must bear the loss. *Ib.*

SEAMEN.

1. A seaman who has received an injury or contracted a disease while in the service of the ship, is entitled to be cured or cared for at the expense of the ship. This right is an ingredient in the compensation to be paid to the seaman under the contract of shipment; and is enforced by an award of additional wages. *The Ben Flint*, 126.
2. The general rule that a seaman is entitled to be cured at the expense of the ship, is applicable to seamen employed on the lakes and navigable rivers within the United States. *Ib.*
3. The claim of the seaman to be cured at the expense of the ship is not forfeited because the hurt or sickness may have been incurred through his negligence, unless something more is shown than mere ordinary carelessness, consistent with good faith in the prompt discharge of duty in obedience to orders. To forfeit the claim, the disability or sickness of the seaman must be owing to vicious or unjustifiable conduct; such as gross negligence operating in the nature of a fraud upon the owners,—willful disobedience to orders,—persistent neglect of duty. *Ib.*
4. *It seems*, that where the sickness or disability of the seaman is caused or aggravated by the neglect or misconduct of any of the officers of the ship, an allowance may be made to the seaman for the expenses of his care, beyond the termination of the voyage. *Ib.*
5. But in the absence of misconduct or neglect on the part of some officer, the obligation of a vessel to provide for a disabled or sick seaman is only co-extensive with the obligation of the seaman to the vessel. It terminates, in ordinary cases, when the shipping contract is dissolved. *Ib.*

SEIZURES.

The jurisdiction of the district courts over causes of seizure, under the laws of impost, navigation, and trade, under section 9 of the

SEIZURES—Continued.

judiciary act of 1789, 1 *Stat. at L.* 77, does not attach unless it is alleged and proved that the property proceeded against was openly and visibly seized prior to the commencement of such proceeding; either within the district where the proceeding is had, or upon the high seas, and afterwards brought within such district. *The Fideliter*, 577.

SHIPPING.

1. The fact that prohibited articles are secretly introduced on board a vessel by persons employed as hands (such as a cook or waiter), at the will of the master, merely, does not expose the vessel to forfeiture under a statute (such as act of March 2, 1799, § 103, 1 *Stat. at L.* 701, which imposes, as the punishment for importing specified articles, a forfeiture of the ship in which they have been imported; provided the articles in question are brought on board without the knowledge or consent of the master or owners, and in defiance of reasonable regulations prescribed on board the ship for securing conformity to the law. *The Governor Cushman*, 14.
2. If the master connives at such acts of the hands on board the vessel, she may be rendered liable to forfeiture; as the owners are liable for the acts of the master in the discharge of his duties as such. But they are not necessarily liable for the acts of all persons employed by the master on board the ship. *Id.*
To entitle a material-man to claim a maritime lien upon a vessel for supplies furnished to her in a foreign port, upon the order of the master, he must show that the supplies in question were necessary to the vessel, and also that some special exigency or necessity existed to require the master to obtain them upon the credit of the vessel. To show only that the supplies were needed, it is not enough. *The Lulu*, 191.
4. A port in another State from that in which a vessel is enrolled and registered, is deemed, in the absence of special facts controlling the question, a "foreign" port, within the rule which confines the maritime lien for supplies to cases of supplies furnished in a foreign port. *Id.*
5. Courts of bankruptcy will, in general, give effect to liens according to priority of date. *Scott's Case*, 386.
6. Maritime liens, which by the law of the admiralty would take precedence over charges of an earlier date, may, however, be accorded a similar preference in a court of bankruptcy. *Id.*
7. A lien for supplies, &c. furnished to a vessel, founded upon a State statute, and not of a strictly maritime character, may be recog-

SHIPPING—*Continued.*

nized and enforced, in a court of bankruptcy; but it cannot relate back, as a maritime lien may do, so as to take priority over a mortgage recorded prior to the creation of such lien. *Id.*

8. The owners of a steam-tug or tow-boat, engaged in the business of towing vessels from point to point, but not receiving the vessels or the property on board of them into their care or custody otherwise than is involved in the mere act of towage, are not liable as common carriers in respect of such employment. To charge them for an injury to the tow, such injury must be shown to have resulted from some neglect or fault in the management of the tug. *The Neaffie*, 465.

EVIDENCE, 1.

SMUGGLING.

SHIPPING, 1, 2.

STATES.

1. The circuit courts are competent to take cognizance of an action prosecuted by a State. *Georgia v. Atkins*, 22.
2. Criminal proceedings in the courts of the United States are according to the course of the common law; except so far as has been otherwise provided by the constitution or acts of Congress. They are not affected by the laws of the several States. *United States v. Shepard*, 431.
3. Hence it is not necessary that the names of witnesses for the prosecution should be indorsed on the indictment or information preferred in one of those courts; although such indorsement may be required by statute of the State. *Id.*
4. The effect of a judgment of a United States court, as a lien upon the lands of defendant, cannot be restricted by State statutes, or by the construction placed by the State courts upon such statutes. *Carroll v. Watkins*, 475.
5. A State statute requiring judgments to be enrolled in the county in which the lands to be affected lie, before they can become liens on real property, has no effect upon the lien of a judgment of a court of the United States. Such judgment becomes a lien on lands throughout the district in which it is recovered. *Id.*

HABEAS CORPUS, 1-8; INDIANS; PRACTICE, 17-19.

STATUTES.

1. The word "corporation," as used in a revenue law declaring that every person or corporation owning a railroad, &c., shall be subject to a tax in respect thereof (Act of June 30, 1864, § 103,

STATUTES—Continued.

- 13 *Stat. at L.* 275, as amended by Act of March 3, 1865, 14 *Id.* 135), does not include a State. A railroad wholly owned by a State, managed by State agents, and the profits of which form a part of the revenue of the State, is not liable to taxation under such a law. *Georgia v. Atkins*, 22.
2. The civil rights bill is not a penal statute. It is a remedial one, and is to be liberally construed. *United States v. Rhodes*, 28.
 3. The extent to which State laws abolishing or restricting imprisonment for debt, are adopted for the guidance of the United States courts,—explained. *United States v. Walsh*, 66.
 4. *It seems*, that a State law forbidding "imprisonment for debt, except in cases of fraud," should be construed as meaning to prohibit imprisonment for debt arising upon contract, except in cases of fraud, and should not be deemed to extend to imprisonment upon a judgment for a statute penalty. *Id.*
 5. A statute providing in general terms that an order of arrest may be issued whenever certain facts appear by *affidavit* is satisfied if the requisite facts appear by a fully verified complaint, and this complaint is laid before the court on applying for the order of arrest. *Id.*
 6. The general rule in respect to the *time* when a forfeiture takes effect, is, that when a statute denounces a forfeiture of property as the punishment of a violation of law, if the denunciation is expressed in direct terms and not in the alternative, the forfeiture takes place at the time when the offense is committed, and operates at that time as a statutory transfer of the right of property to the government. *United States v. Fifty-six barrels of Whiskey*, 98.
 7. No distinction exists, in this respect, between the operation of a statute which declares that, for a specified offense, *the property designated shall be forfeited*, and one which declares that *the offender shall forfeit* the property. *Id.*
 8. Under a statute which punishes one who shall "utter" or "pass" spurious notes, knowing them to be such, with intent to defraud, and which does not in terms require that they be uttered as true or genuine (Act of June 30, 1864, 13 *Stat. at L.* 221, § 10), a defendant may be convicted of *uttering* or *passing*, upon proof that he *sold* and delivered the notes as spurious notes to another person with intent that they should be passed upon the public as genuine. *United States v. Nelson*, 135.
 9. The words "uttering" and "passing," used of notes, do not necessarily import that they are transferred as genuine; the terms include any delivery of a note to another for value, with intent that it shall be put into circulation as money. *Id.*

STATUTES—*Continued.*

10. The fact that other provisions of statute exist which expressly provide a punishment for *selling* spurious notes, does not prevent convicting a defendant under an indictment for *passing, uttering, and publishing* such notes, upon proof that he sold them as spurious, with intent that the purchaser should cause them to be put in circulation as genuine. *Ib.*
11. To authorize a conviction under a penal statute prescribing a punishment for "willfully" removing an official seal from property which has been sealed up by officers of the customs, it must appear that the defendant not only intended to remove the seal, but that he had at the time a knowledge of its character. One who removes such a seal in ignorance of its character, and in the honest execution of a supposed duty in the care and transportation of the property, is not liable to punishment under the statute, for the reason that he cannot be deemed to have acted *willfully*. *United States v. Three Railroad Cars*, 196.
12. The punctuation of a statute, as printed, affords no very decisive test of construction; but may be regarded as one indication of the meaning. *Ib.*
13. In general, where an action for the recovery of a penalty or a proceeding to enforce a forfeiture is pending at the time of the repeal of the statute imposing such penalty or forfeiture, or is instituted afterwards, the repeal is a bar to the action or proceeding, unless the repealing act contains a saving clause. *United States v. Six Fermenting Tubs*, 268.
14. The internal revenue act of 1866, in repealing the act of 1864 contains a saving clause (section 70) which operates to preserve and continue demands which vested, and proceedings which were commenced under the act of 1864. *Ib.*
15. A revenue law ought to be liberally construed, with a view to attain the object for which it is enacted,—viz: the raising a revenue. *United States v. Olney*, 275.
16. A regulation of the treasury department, made in pursuance of an act of Congress, becomes a part of the law, and is of the same force as if incorporated in the body of the act itself. *United States v. Barrows*, 351.
17. Where the statute declaring an offense and its punishment is repealed, without a provision saving pending prosecutions, an indictment previously found, but not yet tried, should be quashed on motion. There is no longer an offense; and no one can be punished for what is not an offense at the time of punishment. *United States v. Finlay*, 364.
18. The provisions of section 2 of the act of March 31, 1868, which

STATUTES—*Continued.*

repeal sections 94 and 95 of the internal revenue law of June 30, 1864, and acts amendatory thereof, do not operate to preserve prosecutions commenced but not carried to judgment before the repeal took effect. *Ib.*

19. In an action brought by plaintiffs, claiming to sue as a corporation, the defendant, by plea, denied the plaintiffs' incorporation; setting up a general statute of the State which prohibited any charter from taking effect until a certain fee should have been paid into the State treasury; and averring that the plaintiffs had not made the required payment. It appeared that the fee was not paid until after the plea was filed.

Held, 1. That the circuit court was bound to take notice of the State statute, and to enforce it, in the same manner as the State courts would do.

2. That, under the statute, the plaintiffs were not competent to sue as a corporation, at the time of commencing their action, by reason of the omission to make the payment required; and that the plea must therefore be sustained. *Union Horse Shoe Works v. Lewis*, 519.

INDICTMENT, 1, 2.

STATUTES CONSTRUED.

Act of September 24, 1789, 1 *Stat. at L.* 73. *Shuford v. Cain*, 302; *United States v. Shepard*, 481; *The Fidelity*, 577.

Act of May 8, 1792, 1 *Stat. at L.* 275. *United States v. Stevenson*, 495.

Act of March 2, 1793, 1 *Stat. at L.* 838. *Campbell's Case*, 185; *Live Stock, &c. Association v. Crescent City, &c. Co.*, 388.

Act of March 2, 1799, 1 *Stat. at L.* 627. *The Governor Cushman*, 14; *United States v. Twelve thousand three hundred and forty-seven bags of Sugar*, 407; *United States v. Three Horses*, 426.

Act of May 19, 1828, 4 *Stat. at L.* 278. *United States v. Stevenson*, 495.

Act of March 2, 1838, 4 *Stat. at L.* 632. *Akerly v. Vilas*, 284.

Act of February 5, 1853, 10 *Stat. at L.* 161. *Anderson v. Moe*, 299.

Act of August 18, 1856, 11 *Stat. at L.* 138. *Martinetti v. Maguire*, 356.

Act of June 27, 1864, 13 *Stat. at L.* 197. *United States v. Three Railroad Cars*, 196.

Act of June 30, 1864, 13 *Stat. at L.* 218. *United States v. Nelson*, 185.

Act of June 30, 1864, 13 *Stat. at L.* 223. *Georgia v. Atkins*, 22; *United States v. Six Fermenting Tubs*, 268; *United States v. Olney*, 275; *United States v. Thirty-three barrels of Spirits*, 311; *United States v. Barrows*, 351; *United States v. Finlay*, 364.

STATUTES CONSTRUED—*Continued.*

- Act of July 4, 1864, 13 *Stat. at L.* 387. *United States v. Fairchilds*, 74.
- Act of March 3, 1865, 13 *Stat. at L.* 469. *United States v. Barrows*, 351.
- Act of March 3, 1865, 13 *Stat. at L.* 491. *United States v. Three Horses*, 426.
- Act of April 9, 1866, 14 *Stat. at L.* 27. *United States v. Rhodes*, 23; *Turner's Case*, 84; *Live Stock, &c. Association v. Crescent City, &c. Co.*, 388.
- Act of July 13, 1866, 14 *Stat. at L.* 98. *Georgia v. Atkins*, 23; *United States v. Harris*, 110; *United States v. Six Fermenting Tubs*, 268; *United States v. Olney*, 275; *Meador's Case*, 317; *United States v. Simons*, 470.
- Act of March 2, 1867, 14 *Stat. at L.* 517. *Campbell's Case*, 185; *Driggs v. Moore*, 440; *York's Case*, 503; *Norris' Case*, 514.
- Act of March 2, 1867, 14 *Stat. at L.* 558. *Akerly v. Vilas*, 284; *Sands v. Smith*, 368.
- Act of March 31, 1868, 15 *Stat. at L.* 58. *United States v. Finlay*, 364.
- Act of July 20, 1868. 15 *Stat. at L.* 125. *Meador's Case*, 317.

TIME.

In computing the time within which an appeal in bankruptcy must be taken, Sunday is to be counted, except that when the last day would fall on Sunday, that Sunday is to be excluded. *York's Case*, 503.

TRIAL.

1. A circuit court has power to set aside a verdict upon the ground that it is against the weight of evidence. *Hunt v. Poole*, 556.
2. The power to set aside a verdict as against the weight of evidence should only be exercised where the court can clearly see that the jury have acted under some mistake or from some improper motive; where there has been some mistrial apparent to every impartial mind without labored examination; or where the jury have plainly departed from some rule of law, or made unwarranted deductions from the evidence. *Ib.*

VENDOR AND PURCHASER.

Where a purchaser has notice of the facts upon which an adverse claim depends, he is deemed to have notice of the consequences of those facts. *Cuyler v. Ferrill*, 169.

VERDICT.

TRIAL.

WAR.

1. The fact that, during the civil war of 1861-65, a citizen of one of the self-styled Confederate States, being indebted to a citizen of a loyal State, was compelled to pay, and did pay the amount of the demand into the treasury of the Confederate State, under a statute of that State for the sequestration of estates of alien enemies, forms no defense to an action brought by the creditor, in a court of the United States, since the war was terminated, to recover the demand. *Shortridge v. Macon*, 58.
2. The acts of citizens of the Confederate States, before and during the civil war, setting aside the previous State governments, uniting in the confederation, and making war upon the United States, were never operative to accomplish a separation of such States from the Union; nor can they discharge a citizen of one of those States from any duty, or relieve him from any responsibility. *Ib.*
3. The levying war against the United States, committed by the citizens of the Confederate States, was treason against the United States. Neither the pretended acts of secession, nor the magnitude or formidable character of the war, could modify the offense, or constitute a Confederate State government *de facto*, so as to create civil rights which could outlast the war. *Ib.*
4. The courts of the United States will take judicial notice of the existence of the civil war of 1861-65; and of the facts of public history connected with its origin and progress. *Cuyler v. Ferrill*, 169.
5. During the civil war of 1861-65, some of the devisees of lands lying in Georgia, commenced proceedings for a partition of the lands, in one of the courts of Georgia. A partition was ordered and a sale made. At the time when the proceedings were pending, one of the devisees was in the discharge of his duties as a surgeon in the United States army; and was prevented from communication with the State of Georgia, by the war. *Held*, that the proceedings of the Georgia court were void, as against such devisee, for want of jurisdiction. *Ib.*
6. A payment of purchase money made in "Confederate notes," although made while the civil war of 1861-'65 was still pending, and in one of the so-called Confederate States, where such notes were then the usual currency, and although the notes were accepted as money, cannot constitute the party making the pay-

WAR—Continued.

- ment a *bona fide* purchaser for value, so as to entitle him to equitable protection or relief in the circuit court. *Id.*
7. The securities known as "Confederate treasury notes," issued by the self-styled Confederate States, during the civil war of 1861-'65, although not "bills of credit," issued by a State, and as such prohibited by the Constitution of the United States, Art. I. § x. subd. 1, were, nevertheless, illegal; because they were issued by a pretended government, organized in the name of certain States, by subjects of the United States, who were at the time in rebellion against the rightful government of the United States, with design to dismember and destroy it. *Bailey v. Milner*, 261.
 8. A promissory note given in consideration of such bills is void, and does not constitute a debt provable in bankruptcy. *Id.*

WAREHOUSEMEN.

The courts of the United States have not jurisdiction of actions against warehousemen, as such, prosecuted between citizens of the same State. *The Mary Washington*, 1.

WATERCOURSES.

1. The owner of land bordering upon a stream, although navigable, in which the tide does not ebb and flow, is presumed to be the owner of the land beneath the water to the center line of the stream. *Avery v. Fox*, 246.
2. Such riparian proprietor has also a right to use the water of the stream, in its flow, in any manner not inconsistent with the rights of others in it. *Id.*
3. But the public have the right to use all navigable streams as highways; and the owner of the bed of such a stream has no right, as such, in the waters thereof, which can authorize him to impede or obstruct navigation upon it. The right of the public, for purposes of navigation, is paramount to that of the riparian proprietor. *Id.*
4. If an alteration in the course of a stream, by diverting it from its natural channel to an artificial one, for the purpose of improving navigation, results in depriving the riparian owner of the use of the stream which he is employing advantageously as an incident to his land, this is taking the private property of such owner, in the use of the water, for a public use; and he is entitled to compensation. *Id.*

WITNESS.

Courts, 12.



